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Supreme Court of the United States

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,
Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Board of Education of the Bratenahl, Ohio, Local School District petitions this Court to issue its writ of certiorari to review the judgment of the Supreme Court of Ohio in Cause No. 77-172 on the docket of that court.

OPINIONS

To understand the nature and depth of the denial of due process by the State of Ohio that summarily (unless this Court shall adjudge to Bratenahl the constitutional

protection it claims) destroys the Bratenahl school system and takes its physical property, it is important to note, not only the opinion in the case that now comes here for review, but also the opinions and judgments in prior litigation of the same issue between these parties, *viz.*:

A. In This Proceeding, the State of Ohio Has Undertaken to Destroy the 80-Year Old Bratenahl School System, and to Take Its Property, Without the Due Process Guaranteed by the Fourteenth Amendment

The summary dissolution of the Bratenahl District, and the seizure of Bratenahl's property, without judicial review, was upheld by a 4-to-3 decision in the Supreme Court of Ohio:

> "despite the fact there was no notice or opportunity to be heard afforded Bratenahl." 53 Ohio St. 2d at 177, 373 N.E.2d at 1242, A116.

The opinion of the Supreme Court of Ohio, written by Mr. Justice Sweeney, concurred in by Mr. Chief Justice O'Neill and Justices Herbert and William B. Brown, over the dissent of Justices Celebrezze, Paul W. Brown and Locher, is reported in 53 Ohio St. 2d 173, 373 N.E.2d 1238. It is reproduced in the Appendix, printed under separate cover, at page A111.

The opinion of the Court of Appeals of Franklin County, Ohio, upon a 2-to-1 division, by Judges Whiteside and Strausbaugh with Judge Holmes dissenting (which the Supreme Court of Ohio reversed) is not officially reported but is reproduced in the Appendix A81, as is the unreported opinion of the trial court (which the Court of Appeals reversed) written by Judge Gillie, sitting in the Common Pleas Court of Franklin County, Ohio. A78.

B. The State of Ohio Has Also Denied Bratenahl Due Process by Stripping It, Without Notice or Opportunity to Be Heard, of Rights Adjudicated and Vested by Final Judgments in Prior Litigation Between the Same Parties on the Same Issue

The administrative order of February 9, 1970, issued without notice, hearing, or judicial review, A15, strips Bratenahl of rights (1) subsequently adjudged and vested in statutory review proceedings by final judgment entered August 24, 1973, A45 (vacating that order, issued 3-1/2 years earlier) and (2) subsequently adjudged and vested in a separate declaratory judgment action by final judgment entered August 30, 1973, A67, that "the Bratenahl Local School District legally exists." Thus:

1. Upon statutory review, Ohio's 1970 dissolution order was vacated by final judgment in 1973, before the present proceeding was commenced

Ohio's February 9, 1970, order, which, if enforced, would result in the dissolution and seizure of the Bratenahl District, was vacated in statutory review proceedings, before Ohio commenced the present proceedings. The review proceedings that resulted in final judgment on August 24, 1973, vacating the February 9, 1970, order followed this course:

On April 23, 1970, Judge Marshall in the Common Pleas Court of Franklin County, Ohio, held the order of February 9, 1970, "was not an adjudication nor was it a final appealable order," and dismissed Bratenahl's appeal in an unreported opinion reproduced in the Appendix at page A18.

On May 26, 1970, the Court of Appeals of Franklin County, Judges Troop, Strausbaugh and Stern,

stayed enforcement of the February 9, 1970, order in an unreported opinion reproduced in the Appendix at page A22.

On April 27, 1971, the Court of Appeals of Franklin County, Judges Strausbaugh, Troop and Holmes, reversed the dismissal of the statutory appeal, holding (1) the trial court did have subject matter jurisdiction, (2) the February 9, 1970, State Board order was an "adjudication", and appealable, (3) adjudging that appeals of "any" State Board action is statutorily mandated under R.C. 3301.13, A51, and (4) remanding the case to the trial court, in an unreported decision reproduced in the Appendix at page A24.

On June 14, 1971, Judge Wright in the Franklin County Common Pleas Court suspended the dissolution order and "any other order * * * which would terminate the existence of the Bratenahl School District," in an unreported order reproduced in the Appendix at page A29.

On August 23, 1971, the Supreme Court of Ohio denied the State Board's motion for a restraining order (to prevent Bratenahl from operating the high school it was to open on September 7, 1971) in an unreported order reproduced in the Appendix at page A30.

On September 22, 1971, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the judgment of the Court of Appeals, which had adjudged the February 9, 1970, order to be an appealable "adjudication" in an unreported order reproduced in the Appendix at page A31.

On April 3, 1972, Judge Marshall in the Common Pleas Court of Franklin County dismissed Bratenahl's appeal and vacated the stay, in an unreported opinion reproduced in the Appendix at page A32.

On September 6, 1972, the Court of Appeals of Franklin County, Judges Troop, Whiteside and Reilly, enjoined the State Board "from enforcing any orders in existence which purport to affect the legal existence of appellant Board of Education, Bratenahl Local School District," in an unreported opinion reproduced in the Appendix at page A34.

On January 9, 1973, the Court of Appeals of Franklin County, Judges Holmes, Whiteside and Reilly, held (1) "Bratenahl in fact does exist and is operating as a school district and, at present maintains schools with grades 1 through 12 inclusive" as required by statute and (2) reversed the decision of the Common Pleas Court, in an unreported opinion reproduced in the Appendix at page A36.

On April 20, 1973, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the adjudication that Bratenahl complies with the twelve grade statute, in an unreported order reproduced in the Appendix at page A43.

On August 8, 1973, Judge Shoemaker in the Common Pleas Court of Franklin County, upon remand from the Court of Appeals, vacated the February 9, 1970, order in an unreported decision reproduced in the Appendix at page A44.

The statutory review thus terminated in a final judgment (from which no appeal was taken) freeing Bratenahl from any charge it was not operating in compliance with Ohio Revised Code §3311.29, A4, the only requirement of which was that the school system maintain "grades one through twelve * * *."

In reliance thereon, Bratenahl, which since September 1971 had operated twelve grades, including a high school, A-v, Item 21, voted bonds and built a new building specially designed for its high school. The new high school building was opened in September, 1975, A-ix, Item 41, and has since housed the Bratenahl high school. Seven classes have now been graduated from the high school. This is the high school the Ohio Supreme Court, in the judgment tendered for review held ceased to exist, eight years earlier, in 1970.

2. In a separate declaratory judgment action, before the proceeding now here for review was commenced, it was adjudicated by final judgment that the Bratenahl Local School District legally exists

Bratenahl filed a separate declaratory judgment action in the Common Pleas Court of Franklin County on November 29, 1971, A47. It resulted, before the present proceeding now here for review was commenced, in a final judgment adjudicating that the Bratenahl Local School District legally exists. That separate litigation found its way to final judgment in the following manner:

On April 29, 1972, the Common Pleas Court of Franklin County, in an opinion by Judge Marshall, dismissed Bratenahl's declaratory judgment suit, in an unreported opinion reproduced in the Appendix at page A52.

On January 9, 1973, the Court of Appeals of Franklin County, Judges Holmes, Whiteside and Reilly, reversed the dismissal by the Common Pleas Court of Bratenahl's declaratory judgment suit, in an unreported opinion reproduced in the Appendix at page A57.

On April 20, 1973, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the Court of Appeals adjudication that Bratenahl's declaratory judgment action should be remanded for decision on the merits, in an unreported order, reproduced in the Appendix at page A65.

On August 30, 1973, on remand from the judgment of the Court of Appeals, Judge Shoemaker in the Common Pleas Court of Franklin County, entered judgment that "Bratenahl Local School District does legally exist" in an unreported entry reproduced in the Appendix at page A67.

No appeal was taken from the final judgment in the statutory review proceedings or from the final judgment in the separate declaratory judgment action.

C. In the Present, Subsequently Commenced Proceeding Now Here for Review, the State of Ohio Has Further Deprived Bratenahl of Due Process by Depriving It of Rights Under the Prior Judgments

After the 1973 final judgments had been entered in the statutory review proceeding vacating the dissolution order of February 9, 1970, A45, and in the declaratory judgment suit adjudging the Bratenahl system legally exists, A67, the State, finding that:

"*On July 1, 1968*, the Bratenahl Local School District did not maintain within such district public schools

consisting of grades one through twelve, inclusive, as required by Section 3311.29, Ohio Revised Code" A4,

issued the October 14, 1974 order here in suit:

"that the Bratenahl Local School District, Cuyahoga County, be hereby dissolved" A69,

and that:

"the funds, property, and indebtedness of said Bratenahl Local School District be transferred to the Cleveland City School District effective as of November 1, 1974 * * *." A76.

This new order of dissolution led to the litigation that now comes here for review. It proceeded as follows:

On December 16, 1975, Judge Gillie, in the Common Pleas Court of Franklin County, upheld the fresh order of October 14, 1974, dissolving the Bratenahl school system as of November 1, 1974, in an unreported opinion reproduced in the Appendix at page A78.

On December 16, 1976, the Court of Appeals of Franklin County reversed and vacated the October 14, 1974, dissolution order in an unreported opinion reproduced in the Appendix at page A81.

On March 22, 1978, the Supreme Court of Ohio reversed, *sua sponte*, on the ground the February 9, 1970, order (which had been adjudicated by final judgments in the prior proceedings) was not "an adjudication" and not "appealable" even though its effect was to dissolve the Bratenahl school district and to take its property. 53 Ohio St. 2d 173, 373 N.E.2d 1238, A111.

JURISDICTION

The judgment of the Supreme Court of Ohio was dated and entered March 22, 1978, A111; rehearing was denied May 5, 1978, A151.

This Court has jurisdiction to review under 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

This case brings here for review the questions:

1. Whether a State denies due process within the meaning of the Fourteenth Amendment when, without notice or hearing, and without judicial review, it orders dissolved an 80-year old public school district and orders its assets transferred to another district.
2. Whether a State denies due process within the meaning of the Fourteenth Amendment when it denies *res judicata* effect to prior final judgments on the same issue between the same parties.
3. Whether a State denies due process within the meaning of the Fourteenth Amendment when it applies prior law, subsequently changed, and fails to apply the law in effect at the time of decision.

CONSTITUTION, STATUTES AND REGULATIONS

This case turns on:

—The Constitution

The Constitution of the United States in its Fourteenth Amendment, §1, says:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

—The Statute

Ohio Revised Code §3311.29, in effect when the order of February 9, 1970 (which was upheld by the Ohio Supreme Court) issued, provides, so far as is here material:

> "after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve * * *." A4.

This statute was amended effective September 30, 1975, to omit the critical date July 1, 1968. A77.

—The Regulations

In 1957, regulations adopted by the Ohio State Board of Education pursuant to Ohio Revised Code §3301.07, provided in §II(d) that a high school:

> "shall have an enrollment of not less than 240 pupils * * *." A1.

At the time Bratenahl sought to establish its high school, in 1970, this requirement had been deleted and in lieu thereof, a new regulation (Standard EDb-403-02, paragraph (C)(14)) had been adopted requiring instead, that a new high school must offer "at least 55 units of credit * * *." A10.

STATEMENT OF THE CASE

Here, as upon an earlier day, it may be said:

> "you may destroy this little institution; it is weak; it is in your hands! * * * It is, Sir, as I have said, a small [school]. And yet there are those who love it!"[1]

The Bratenahl Local School District was organized in the 1890's:

> "In the late 1890's, Bratenahl, then a part of the city of Glenville, opted not to acquiesce in Glenville's decision to join the city of Cleveland. Concomitant with their formation as an autonomous local government, the residents of Bratenahl established their own independent school system, which they have maintained until this day." 53 Ohio St. 2d at 181, 373 N.E.2d at 1243, A120.

That school system is, and since 1968 has been, fully integrated; 27% of its students are black.

It now fights for its life.

Initially, Bratenahl operated only eight grades, kindergarten through grade 8. It did not have a high school.

—Genesis of the Problem

Ohio, on December 1, 1967, amended Ohio Revised Code §3311.29 to require that after July 1, 1968, no school district shall exist which does not maintain "grades one through twelve * * *." A4.

This threatened to end the Bratenahl school system.

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1. Daniel Webster in the *Dartmouth College* case (1819), 4 Wheaton 518, as reported in MILESTONES, page 105.

The reason was that Bratenahl had no high school, and could not establish one because regulations of the State Board then in effect required a high school to have "not less than 240 pupils * * *." A1.

This standard Bratenahl could not meet.

Bratenahl, therefore, sought exception A2, from the 12 grade requirement (which the State Board was authorized to grant, A4) and, as then required by the State Board, agreed that after a two-year extension, to July 1, 1970, of its existence as an eight grade district, Bratenahl would dissolve. A2.

—Then the Law Was Changed

The 240 pupil requirement was repealed.

In lieu of the 240 pupil requirement, the State Board by regulation substituted a new standard, authorizing a high school provided it should offer "at least 55 units of credit * * *." A10. (This was more than the 45 units of credit required of established high schools.) A10.

—The New Standard, Bratenahl Could Meet

Bratenahl commissioned a study by nationally recognized educational consultants and, with the aid of the graduate School of Education of the University of Akron, developed a program and a curriculum. A118.

Based upon its newly authorized opportunity to create its own high school, regardless of its size, Bratenahl, on January 28, 1970 and pursuant to R.C. 3311.29, requested from the State Board:

(1) Leave "to establish and implement a proposal for a high school program * * *." A11, and

(2) A 15 month extension of its existence, beyond July 1, 1970, to establish its high school.

—Leave to Establish High School Denied

The State Board summarily denied Bratenahl's application for leave to establish its high school. A15.

The State Board received the Bratenahl requests on February 6, 1970; on February 9, 1970—three days later—the State Board denied the requests, and did so without notice or hearing. A116. The legal effect of the February 9, 1970, decision (A15), was (1) to deny Bratenahl leave to establish a high school and (2) to dissolve the Bratenahl school system.

—Litigation Ensued

The order of February 9, 1970, was challenged in the courts:

(i) Upon statutory review, the February 9, 1970, order was vacated by final judgment

In statutory review proceedings described above (at pages 3 to 5), the dissolution order of February 9, 1970, was vacated by final judgment of August 24, 1973, from which no appeal was taken, A45.

(ii) In separate declaratory judgment suit Bratenahl was, by final judgment, on August 30, 1973, adjudicated legally to exist

The separate declaratory judgment suit (described above, pages 6 to 7) resulted in final judgment on August 30, 1973, adjudging that the Bratenahl Local School District legally exists, A67.

The dissolution order of February 9, 1970, having been vacated by final judgment, and the Bratenahl school district having been adjudicated by final judgment lawfully to exist—and with no litigation pending anywhere—Bratenahl residents voted a bond issue in 1974 and with the proceeds started construction of a new high school building in 1974. It was completed in 1975. A-ix, Item 41. Since then, the high school has been ocnducted in the new building.

—A New Attack Was Launched

The State—more than a year after the two final judgments of August, 1973—on October 14, 1974, issued a new dissolution order. A69. Its travel through the courts has been traced above. See pages 7 to 8.

As all parties recognized, the October 14, 1974, order launched a new proceeding. The Court of Appeals so regarded it. That court recognized that it had before it, not the February 9, 1970, dissolution order disposed of by final judgments in the prior litigation, but that, as the Court of Appeals put it:

> "*Thereafter*, the present proceedings were instituted to fulfill the State Board's desire to dissolve Bratenahl pursuant to R.C. 3311.29 by [State Board] resolution of September 10, 1973, indicating the Board's preliminary determination to dissolve Bratenahl . . ." (A84)[2],

under a yet to be held Administrative Procedure Act hearing.

The State Board was in agreement. It assured the Supreme Court of Ohio in the case that now comes here that:

> "the origin of this appeal *is the October 14, 1974, unanimous resolution and order* of the State Board which ordered the dissolution of the Bratenahl Local School District under Revised Code 3311.29 * * *."[3]

2. Emphasis supplied throughout.

—The Result in the Supreme Court of Ohio

The Supreme Court of Ohio, inexplicably and unexpectedly, focusing on the February 9, 1970, order, held Bratenahl thereby dissolved—eight years earlier—on July 1, 1970. Over three dissents, Mr. Justice Sweeney said:

> "This court concludes that the Bratenahl Local School District was properly dissolved *on July 1, 1970*, by the state board." 53 Ohio St. at 178, 373 N.E.2d at 1242, A117.

The February 9, 1970, order was not before the Ohio Supreme Court; it was not argued by the parties—they debated instead the validity of the new October 14, 1974, order brought before the Ohio Supreme Court in this, the second, statutory review.

Nevertheless, the Supreme Court of Ohio, *sua sponte*, held the February 9, 1970, order:

(1) Was not an "adjudication," although, as the Ohio Supreme Court also held, it destroyed the Bratenahl schools and took Bratenahl's property (Syllabus 1, A111), and

(2) Bratenahl had no "right to notice and hearing", even though its school was dissolved and its property taken (Syllabus 2, A112).

The denial of due process, thus unexpectedly arising under the Ohio Supreme Court's opinion, was challenged

3. State Board's brief on the merits in the Supreme Court of Ohio, p. 2.

by motion for rehearing, A121 and 145, which the Supreme Court of Ohio denied. A150.[4]

The result of the Ohio Supreme Court decision is a massive denial of due process that, for reasons to be stated, calls for review:

REASONS FOR GRANT OF WRIT

1. By state action, Bratenahl is destroyed and despoiled of its property. Administrative fiat and decision of the Supreme Court of Ohio have accomplished this taking. Each, constitutes State action within the meaning of the Fourteenth Amendment. This is the fulcrum on which this Court made turn the civil rights guaranteed by the Fourteenth Amendment. In the first of the great cases in this Court that accomplished the turnaround in the law of this land, *Shelley v. Kraemer* (1948), 334 U.S. 1, this Court held enforcement by the courts of racial deed restrictions *is* State action within the meaning of the Fourteenth Amendment. This Court held:

> "That the action of state courts and judicial officers in their official capacities *is to be regarded as action of the State* within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." 334 U.S. at 14.

Many other decisions establishing this point are collected, reviewed, and analyzed in *Shelley*. 334 U.S. at 14-20.

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4. Where, as here, a federal question unexpectedly arises upon the court's opinion the issue may be raised and preserved by petition for rehearing. *Saunders v. Shaw* (1917), 244 U.S. 317; *American Surety Co. v. Baldwin* (1932), 287 U.S. 156.

2. The most elementary demand of the due process, here denied, is notice and hearing. Here, as Mr. Justice Brandeis observed in *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U.S. 673:

> "the practical effect of the judgment * * * is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." 281 U.S. at 678.

Fairness of procedure "is due process in the primary sense." 281 U.S. at 681.

Not only was the February 9, 1970, administrative order on which the Ohio Supreme Court made this case turn, entered by the State Board without notice or hearing, but, additionally, the Ohio Supreme Court, itself, gave neither notice nor opportunity for hearing that the case was to turn on an order which, in prior litigation, had been vacated and held for naught in two final judgments. The Ohio Supreme Court decision, itself, thus additionally deprived Bratenahl of notice, hearing or judicial review—even though that decision terminated the Bratenahl system and took its property.

Not even a d[illegible]license may be taken away without notice and heari[illegible] *Burson* (1971), 402 U.S. 535. Here, an 80-yea[illegible]ol system is destroyed and its property taken in [illegible]ce of this Court's holding (in another Ohio case), *Goss v. Lopez* (1975), 419 U.S. 565, that even a 10-day suspension of a high school student *requires notice and hearing*.

The most fundamental demand of due process is notice and hearing, as this Court's cases show:

> To evict a tenant, *Thorpe v. Housing Authority of the City of Durham* (1969), 393 U.S. 268;

To take back a gas stove and phonograph sold under conditional sales contracts on which $200 remained unpaid, *Fuentes v. Shevin* (1972), 407 U.S. 67;

To seize $63.18 of wages, *Sniadach v. Family Finance Corp. of Bay View* (1969), 395 U.S. 337;

To terminate public assistance payments, *Goldberg v. Kelly* (1970), 397 U.S. 254, 260-262, 264, 267-269.

In this case, to close down an 80-year old school and take its property, while "confronted with the issue of whether Bratenahl was entitled to notice and a hearing," 53 Ohio St. 2d at 176, 373 N.E.2d at 1241, A115, the Ohio Supreme Court blandly adjudged Bratenahl's eviction from its school system, and the seizure of its property, valid, without judicial review, and:

"despite the fact there was no notice or opportunity to be heard afforded Bratenahl." 53 Ohio St. at 177, 373 N.E.2d at 1242. A116.

3. Refusal to give res judicata effect to the two prior final judgments in earlier litigation between the same parties on the same issue is a denial of due process.

The February 9, 1970, order on which the Ohio Supreme Court made this case turn, was vacated and held for naught in two 1973 final judgments between the same parties on the same issue. To, in 1978, turn the clock back eight years to the February 9, 1970, order is as unlawful as this Court adjudged like disregard of earlier judgments in *McCullough v. Virginia* (1898), 172 U.S. 102. That case concerned the acceptance of Virginia bonds for taxes, a question which had been adjudicated in earlier litigation. This Court observed:

"Now, at the end of twenty-seven years from the passage of the act [authorizing the bonds and making them eligible for taxes], we are asked to hold that this guarantee of value, so fortified as it has been [by decisions of the courts], was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing." 172 U.S. at 108.

This court's reaction was: "Such a result is so startling that it at least compels more than ordinary consideration." 172 U.S. at 108-109.

This Court held the rights acquired under the prior judgments could not be denied. Said this Court:

"It is not within the power of a legislature to take away rights which have been once vested by a judgment." 172 U.S. at 123.

Rights under the prior judgments, the Court added, "could not constitutionally be taken away." 172 U.S. at 125.

This Court has so held whenever the question has arisen, as in:

Cromwell v. County of Sac (1876), 94 U.S. 351 where this Court ruled a prior judgment "constitutes an absolute bar to a subsequent action." 94 U.S. at 352.

Garfield v. Goldsby (1908), 211 U.S. 249, where this Court held "one who has acquired rights by an administrative or *judicial* proceeding cannot be deprived of them without notice and an opportunity to be heard." This Court added "The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, *is of the essence of due process of law.*" 211 U.S. at 262.

The Ohio Supreme Court's disregard of the prior judgments is the more inexplicable since the very issue on which the Ohio Supreme Court ruled—that the February 9, 1970, order was not an "adjudication" and not "appealable"—was *raised and rejected in the first statutory review.* A-IV, Item 18, and A30.

That holding in the prior review, i.e., that the February 9, 1970, order was an "adjudication" and "appealable" and that the court had jurisdiction to pass upon it, foreclosed further inquiry into that subject as *Baldwin v. Iowa State Traveling Men's Association* (1931), 283 U.S. 522 makes clear. In *Baldwin,* the claim was that a prior judgment was a nullity because the court issuing that judgment had no jurisdiction over defendant. This Court rejected that argument and held that the prior Court's determination of its jurisdiction was res judicata on the issue of that Court's jurisdiction, adjudging:

> "Public policy dictates * * * that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered *forever settled* as between the parties." 283 U.S. at 525.

This Court further held in *American Surety Co. v. Baldwin* (1932), 287 U.S. 156, at 166:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

This would be true even if the court's judgment in the earlier litigation (that it did have jurisdiction) were erroneous. *American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 165-166. The rule is, as this Court put it in *Angel v. Bullington* (1947), 330 U.S. 183, in an opinion by Mr. Justice Frankfurter:

> "That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata.*" 330 U.S. at 187.

One who has litigated an issue, this Court pointed out:

> "cannot begin all over again in an action involving the same issues before another forum in the same State." 330 U.S. at 190.

Prior to the instant case, the Supreme Court of Ohio adhered to these rules. *Claxton v. Simons* (1963), 174 Ohio St. 333, 189 N.E.2d 62.

4. Failure to give effect to changes in the law is a denial of due process. The Supreme Court of Ohio in making the case turn on the order of February 9, 1970, and adjudging Bratenahl dissolved because Bratenahl on *July 1, 1968,* maintained only eight grades and not grades 1 through 12, failed to give effect to the changes in the law *in effect at the time of its decision.* The law changed in two respects:

(1) The State standard requiring 240 pupils to allow the establishment of a high school was repealed and in its place was substituted a new standard requiring 55 units of credit. A1 and A10.

(2) The statute, Revised Code §3311.29, was amended effective September 30, 1975, *to eliminate* any reference to the here critical date, July 1, 1968. A77.

The Supreme Court of Ohio was obligated, as a matter of due process, to give effect to the law as it was, not on July 1, 1968 and prior thereto, but as it was on March

22, 1978, the date of the decision in the Supreme Court of Ohio:

Bradley v. School Board of the City of Richmond (1974), 416 U.S. 696, 711-721;

Thorpe v. Housing Authority of the City of Durham (1969), 393 U.S. 268, 282;

Hodges v. Snyder (1923), 261 U.S. 600, 602;

United States v. Schooner Peggy (1801), 1 Cranch 103, 110.

Hodges is particularly helpful.

Hodges held, in a due process context, that as here, state statutes governing the existence of school districts, are determinative of the rights of a school district, as of the *effective* dates of such statutes, and that prior inconsistent determinations of a school district's existence, whether derived by judgment or by statute, are superceded as here, by subsequent legislative enactments.

When the Supreme Court of Ohio decided this case, Bratenahl complied with every requirement of law. That is the law by which its right to live has to be judged.

CONCLUSION

The writ should issue:

(1) To preserve an 80-year old local school system in a community where the citizens have voted to tax themselves to build a new high school and have passed all necessary school levies,

(2) To vindicate the demand of due process that:

(a) Notice and hearing are essentials of due process;

(b) Rights under prior final judgments cannot summarily be taken away;

(c) The law to be applied is the law in effect at the time of the decision.

Respectfully submitted,

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August 1, 1978

Supreme Court, U. S.
FILED
JUL 29 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,

Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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and
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(November, 1971, through August, 1973)

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33. *August 16, 1972,* Bratenahl Notice of Appeal to the Court of Appeals, Case No. 72AP-269, appealing the trial court judgment (Item 32) which had dismissed Bratenahl's declaratory judgment action.

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This final judgment in the Bratenahl declaratory judgment action Case No. 247,705 was not appealed.

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40. *October 21, 1974,* Bratenahl Notice of Appeal, to the Court of Common Pleas, challenging the validity of the October 14, 1974, State Board dissolution order (Item 39).

41. *September, 1975,* Bratenahl opens its newly built, specially designed, centrally located high school, housing grades nine through twelve.

42. Effective September 30, 1975, R. C. Section 3311.29 is amended to delete the crucial date, July 1, 1968 ..... A77

43. *December 16, 1975,* Court of Common Pleas, on remand from the Court of Appeals, Case No. 74CV-10-3903, affirms the October 14, 1974, State Board dissolution order (Item 39) A78

44. *January 27, 1976,* Bratenahl Notice of Appeal to the Court of Appeals of the trial court's affirmance of the October 14, 1974, State Board dissolution order (Item 39) in Court of Appeals, Case No. 76AP-67.

45. *December 16, 1976,* Court of Appeals decision, on the merits, in Case No. 76AP-67, (1) reversing the trial court's affirmance of the October 14, 1974, State Board dissolution order (Item 39) and (2) holding "the establishment and maintenance of grades one through twelve within the Bratenahl School District brought it into full compliance with R. C. Section 3311.29 in September, 1971", and (3) "when the February 9, 1970, order (Item 9) was vacated (Item 28) and no further proceedings therein were to be held [trial court final judgment vacating the February 9, 1970, State Board order was not appealed by either side (Item 28)] no longer could the issue as to whether an exception should have been granted on February 9, 1970, be determined, but thereafter only the question *in praesenti* could be considered and determined" A81

46. *April 14, 1977,* Supreme Court of Ohio grants the State Board's motion to certify

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47. *March 22, 1978,* Supreme Court of Ohio decision, 4-3, reversing the December 16, 1976, Court of Appeals decision (Item 46) in favor of Bratenahl and holding (1) the February 9, 1970, State Board order (Item 9), entered in the first Bratenahl appeal, did not constitute an "adjudication" and was not appealable, and that the Bratenahl Local School District was dissolved on July 1, 1970 ..... A111

48. *March 31, 1978,* Bratenahl Motion and Memorandum in support of rehearing by the Supreme Court of Ohio urging that the Supreme Court of Ohio (1) understandably, but mistakenly, had decided a case that was not before it, (2) the property of the Bratenahl School District is taken without the due process of law guaranteed by both the Ohio and Federal Constitutions, (3) Dissolution of the Bratenahl School District in 1974 may not lawfully be determined on the basis of conditions as they were in 1970 and (4) public policy requires rejection of the Order of the State Board ... A121

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52. *June 29, 1978,* Supreme Court of Ohio Entry in Case No. 77-172 providing:

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Supreme Court of the United States

October Term, 1978

No. .....

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,

Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

[1] MINIMUM STANDARDS FOR OHIO HIGH SCHOOLS 1957

* * * * *

II. ORGANIZATION OF SECONDARY EDUCATION

* * * * *

d) To be considered a permanent high school center, a tax supported school district shall have an enrollment of not less than 240 pupils in grades nine through twelve and a tax duplicate of not less than $5,000,000.

However, an existing high school which does not meet these criteria but fully meets all other minimum standards shall continue to be chartered by the State Board of Education.

* * * * *

[2] BRATENAHL RESOLUTION (1) REQUESTING AN EXCEPTION TO SECTION 3311.29, REVISED CODE, FOR A PERIOD OF TWO YEARS

WHEREAS, Section 3311.29 O.R.C. requires the dissolution of any school district not maintaining grades one through twelve after July 1, 1968, and the consolidation of such district with an adjacent district or districts, unless an exception is authorized by the State Board of Education; and

WHEREAS, the Bratenahl Local School District maintains kindergarten and grades one through eight, and the Cleveland City School District is the only contiguous school district; and

WHEREAS, Dr. Paul Briggs, Superintendent of the Cleveland School District has suggested as of June 4, 1968, that many factors need to be considered before a consolidation of the two school districts can be effected; and

WHEREAS, the Cleveland school buildings and classrooms in the area of Cleveland adjacent to the Bratenahl School District are at the present time overcrowded despite a decline in population and school enrollment in such area during the past two years and such decline of population and school enrollment may be expected to continue; and

WHEREAS, the Cleveland School System is constructing new school facilities in the area adjacent to Bratenahl to relieve the present classroom overcrowding; and

WHEREAS, in two years the Cleveland School System will be better able, because of a declining school enrollment from Cleveland and further progress in its building construction program, to accommodate pupils from the area presently constituting the Bratenahl School District; and

WHEREAS, Dr. Paul Briggs, Superintendent of the Cleveland School District, has indicated his willingness that the Cleveland School System participate in a study with Bratenahl and the State Department of Education to work out the details and procedures of consolidation of the two school systems; and

WHEREAS, topographic and residential features of the Bratenahl School District, especially its isolation from the Cleveland School District by a railroad and a freeway, require special study and consideration of pupil transportation patterns, school access, and pupil assignment; and

WHEREAS, it would be desirable that additional time be devoted to the development of curriculum coordination prior to actual consolidation; and

WHEREAS, this Board has by resolution indicated its willingness and interest in conducting a demonstration interim program of pupil integration involving pupils from Cleveland in the Bratenahl school, and such program would be a useful community experience and experiment and would facilitate the development in an orderly manner of the procedures and adjustments which should precede a consolidation of the two school systems; and

WHEREAS, the consolidation of a suburban school system having a low teacher-pupil ratio and ample financial resources into a large central city school system having a lower per pupil tax duplicate involves many unique educational, sociological and economic problems and ad-

justments for which an additional period of two years would be desirable;

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Bratenahl Local School District that, for the reasons set forth hereinabove and other sufficient reasons, this Board respectfully requests the State Board of Education to approve and authorize an exception for the Bratenahl School District to the provisions of Section 3311.29 O.R.C. for a period of two years, commencing July 1, 1968.

BE IT FURTHER RESOLVED that this Board recognizes that, effective July 1, 1970, the Bratenahl Local School District will cease to exist and its territory will be joined with and made a part of the Cleveland City School District.

Passed: June 8, 1968

/s/ Samuel G. Wellman, President

[3] STATUTE REQUIRING TWELVE GRADES

§ 3311.29 School district must maintain public school; exceptions.

No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education.

HISTORY: 125 v 511 (Eff 6-1-54); 131 v 767 (Eff 8-16-65); 132 v S 350. Eff 12-1-67.

[4] A RESOLUTION (2) OF THE BOARD OF EDUCATION OF THE BRATENAHL LOCAL SCHOOL DISTRICT

WHEREAS, the Board of Education of the Bratenahl Local School District has always during its more than sixty years of existence extended to all educable children of public school age, resident within its District, the full extent of the educational facilities of said District, including all activities and programs bearing upon the social, recreational and cultural development of such children, without distinction or discrimination on account of the racial origin, religious tenets or physical characteristics of such children or the economic situation of their parents, and said Board, and the administrative, teaching and other personnel employed by it, have at all times endeavored to adhere to the principles of educational equality; and

WHEREAS, it has been brought to the attention of this Board by residents of the District and by others, that by reason of its District having a relatively high tax valuation per pupil available to support its kindergarten and 8-year elementary educational program, as compared to

the per pupil tax valuation available to support the educational programs of the adjacent City Cleveland School District, the children resident in the Bratenahl School District have been and are in position to receive a substantially higher cost (per pupil) education than the children of the adjacent portions of the Cleveland School District, although the tax rates for the two districts are now substantially alike; and

WHEREAS, the building and staff facilities of the Bratenahl School District are not presently being used to their maximum capacity, while the school facilities of the Cleveland School District located nearest to the Bratenahl School District are presently overcrowded; and

WHEREAS, this Board is of the opinion that the total training of the children resident within its District, educationally as well as socially, would be improved if the presently unused capacity of this District's facilities, including staff, were to be brought substantially closer to maximum usage by the acceptance into the Bratenahl School of educable children of the ages normally being instructed in kindergarten through grade 8 resident in the generally economically depressed portions of the Cleveland School District nearby to the Bratenahl School District; and

WHEREAS, public-spirited residents of the Village of Bratenahl and others have indicated willingness to lend substantial financial support to a well-planned and organized program which would make available, on a total or partial basis, scholarships for tuition attendance in the Bratenahl School of non-resident children, preferably resident in the adjoining Glenville area of Cleveland, the number of tuition pupils to be based upon the capacity of the Bratenahl School facilities up to a maximum, after the

program has become fully established, of approximately 25% of the total School attendance.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Bratenahl Local School District that this Board does hereby declare, as a policy binding upon itself and its staff its willingness to accept as students in its system, kindergarten through grade 8, children from the Glenville area, pursuant to a program approved by this Board in cooperation with the Cleveland School System based upon the contribution of funds, as aforesaid, to enable payment in behalf of such students of legally required tuition, transportation and other incidental expenses; and

BE IT FURTHER RESOLVED, that this Board and the staff of the School will lend all aid and assistance within their capacities toward bringing about the commencement of such a program at the earliest possible time and the President of the Board is hereby authorized to proceed forthwith with the consultation and advice of this Board and the School Superintendent to seek such specialized sociological and educational services as may be necessary or appropriate to prepare the School and staff for the efficient and effective absorption into the student body of such non-resident students.

Passed: June 8, 1968 /s/ Samuel G. Wellman, President

[5] STATE BOARD ORDER GRANTING BRATENAHL A TWO YEAR EXTENSION

Minutes
State Board of Education of Ohio
June 10, 1968

RESOLUTION

WHEREAS, this Board has considered at great length the various factors involved in the merger of the Bratenahl Local District and is aware of the complexities associated with the merger including an appropriate planning for the continuity of the education of the pupils enrolled in secondary schools; and

WHEREAS, the Superintendent of the Cleveland Schools has stated that "Many factors will need to be considered before consolidation can be effected"; and

WHEREAS, some postponement of the merger of Bratenahl with Cleveland appears to be desirable in view of the fact that the enrollment in the presently overcrowded adjacent Glenville area of Cleveland has been declining for the past two years in the elementary schools (1550 pupils) and a new elementary school is in the process of construction which should assist in the future merger; and

WHEREAS, the Cuyahoga County Board of Education has requested that the Bratenahl Local Elementary District merger with Cleveland City Schools be considered as an exception to Section 3311.29 of the Ohio Revised Code; and

WHEREAS, the Bratenahl Local Board of Education has presented a very desirable plan of racial integration; and

WHEREAS, the Bratenahl Local Board of Education, by Resolution, has unanimously acted to provide for the merger with the Cleveland Public Schools on July 1, 1970;

BE IT RESOLVED that an exemption from the provisions of Section 3311.29 O.R.C. be granted to Bratenahl Local School District for a period not to extend beyond July 1, 1970.

BE IT FURTHER RESOLVED that the continuation of such exemption for one year only beyond July 1, 1969, be conditioned upon said school district fully implementing during the 1968-69 school year, the innovative and exemplary program described in the resolution of said board adopted June 8, 1968.

BE IT FURTHER RESOLVED that in accordance with the action of the Bratenahl Board of Education in its resolution adopted June 8, 1968, and entitled, "A Resolution Requesting an Exemption to Section 3311.29, Revised Code, for a Period of Two Years," said district shall cease to exist effective July 1, 1970, and shall be merged with the Cleveland City School District on said date, provided however, that nothing herein contained shall prevent this State Board from terminating such exemption at an earlier date.

BE IT FURTHER RESOLVED that Resolutions (1) and (2) passed by the Bratenahl Board of Education be made a part of the minutes of this meeting.

[6] REVISED MINIMUM STANDARDS FOR OHIO HIGH SCHOOLS

(July 1, 1968)

STANDARD EDb-403-02

CURRICULUM AND INSTRUCTION

The high school shall provide a comprehensive, college preparatory or vocational curriculum which includes all those pupil activities for which it assumes responsibility and conforms to the requirements of Section 3313.60, Revised Code of Ohio. Instructional methods and procedures shall be those which most effectively promote the purpose of the school program and which meet the needs and individual differences of all pupils.

* * * * *

(C) Each high school shall be comprehensive unless classified by the State Department of Education as college preparatory, vocational or island schools and shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 45 units of credit as follows:

(1)	Art	1 unit
(2)	Business education	5 units
(3)	English	5 units
(4)	Foreign language	2 units
(5)	Home economics	3 units
(6)	Industrial arts	3 units
(7)	Mathematics	3 units
(8)	Music	1 unit
(9)	Physical education and health	1 unit
(10)	Social studies	3 units
(11)	Science	3 units
(12)	In addition to the above or other subjects	15 units

(13) Three-year high schools may include units or their equivalent scheduled in the ninth grade of junior high schools within the school system.

(14) A new tax supported high school organized after July 1, 1968, shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 55 units of credit, including the units listed in (1) through (13) above.

* * * * *

[7] BRATENAHL RESOLUTION REQUESTING THE STATE BOARD OF EDUCATION TO APPROVE A HIGH SCHOOL PROGRAM IN THE BRATENAHL SCHOOL DISTRICT AND THE CONTINUED EXISTENCE OF THIS DISTRICT

(January 28, 1970)

WHEREAS, this Board, in June of 1968, recognized that this District would be merged with the Cleveland City School District pursuant to the provisions of Section 3311.29 of the Ohio Revised Code, as of July 1, 1970, at the expiration of the two-year exception granted by the State Board of Education, because of the fact that this District did not conduct a high school program, and

WHEREAS, subsequent to action of this Board and the State Board in June of 1968, citizens and parents in this community, parents of children from the City of Cleveland attending school in this District, and members of this Board have urged consideration of the possibility of conducting a high school program in the Bratenahl School system, and

WHEREAS, this Board has engaged the services of Stanton Leggett and Associates as educational consultants, has reviewed the financial and other factors involved, and has determined that the operation of a high school program in the Bratenahl School District is feasible and desirable, and

WHEREAS, pursuant to its commitment to the State Board of Education, this Board has conducted a program of racial integration in the Bratenahl School under which black pupils from the Cleveland School District have attended school in Bratenahl, constituting approximately one-fourth of the school population in the Bratenahl School, and

WHEREAS, the proposal to conduct an innovative high school program in Bratenahl to continue the program of racial integration in the Bratenahl Schools and to continue the existence of the Bratenahl School District has been presented to the Superintendent of Public Instruction in Ohio and his staff in the Ohio Department of Education, and to the State Board of Education through the efforts of the president and other members of this Board, its legal counsel, its superintendent, and Stanton Leggett and Associates;

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Bratenahl Local School District that the State Board of Education is urgently and respectfully requested to consider favorably the proposal for an innovative high school program in Bratenahl and the request for approval of the continued existence of this School District, subject to approval by the Bratenahl electors of the necessary bond issue and tax levy for operating purposes.

BE IT FURTHER RESOLVED that the written request presented to the State Board for such approval and the proposal prepared by Stanton Leggett and Associates, and all of the actions of the president and this Board, its superintendent and legal counsel, in furtherance of this program are hereby accepted, approved and ratified.

Roll Call: Ayes—Mrs. Horn, Mrs. Landis, Mrs. Mackenzie, Mr. Wellman
Nays—0; Absent—Mr. Belavic; Motion was approved and Resolution adopted.

[8] RESOLUTION PROPOSED BY BRATENAHL LOCAL SCHOOL DISTRICT, JANUARY 28, 1970 AND FEBRUARY 6, 1970 FOR CONSIDERATION BY THE STATE BOARD OF EDUCATION

WHEREAS, this Board by resolution adopted on June 10, 1968, granted an exception to the Bratenahl Local School District to the provisions of Section 3311.29 O.R.C. for a period of two years; and

WHEREAS, by such resolution this Board ordered the merger of the Bratenahl Local School District into the Cleveland City School District as of July 1, 1970; and

WHEREAS, the Bratenahl Board of Education has developed an innovative proposal for the operation of a high school program, subject to approval of a bond issue and a tax levy by the Bratenahl electors at the May 5, 1970 primary election; and

WHEREAS, the Bratenahl Board of Education has successfully conducted a voluntary program of racial integration in the Bratenahl School and desires to continue the program of integration through grades 1 to 12; and

WHEREAS, the operation of a twelve-grade school system in the Bratenahl School District will remove the

statutory requirement for merger of the Bratenahl School District with the Cleveland School District;

NOW, THEREFORE, BE IT RESOLVED by the State Board of Education that:

1. The proposal for operation of the Bratenahl High School is hereby approved, subject to approval of said bond issue and tax levy at the May 1970 primary election and subject to compliance with all applicable State standards.

2. Subject to approval of said bond issue and tax levy and subject to approval by the Superintendent of Public Instruction by July 1, 1970, of the Bratenahl financing plan for continuation of its voluntary integration program for a period of at least five years, an additional 15-month extension from the provisions of Section 3311.29 O.R.C. is hereby granted to the Bratenahl School District, in order to provide time for the establishment and implementation of said high school program.

3. The previous order of this Board to merge the Bratenahl Local School District with the Cleveland City School District is hereby rescinded, provided, however, that if a full 12-grade school system is not operated by the Bratenahl Board of Education by September 1971, then the Bratenahl School District shall cease to exist, and shall be merged with the Cleveland City School District.

[9] STATE BOARD OF EDUCATION OF OHIO ORDER FEBRUARY 9, 1970

WHEREAS, the Bratenahl Board of Education, on June 8, 1968, resolved that, effective July 1, 1970, the Bratenahl Local School District would cease to exist and its territory be joined with and made a part of the Cleveland City School District; and

WHEREAS, this Board, by a resolution adopted on June 10, 1968, granted an exception to the Bratenahl Local School District to the provisions of Section 3311.29, O.R.C., for a period of two years; and

WHEREAS, the Bratenahl Board of Education recently submitted a proposal to this Board requesting the approval of a proposed high school program in Bratenahl, and requesting an extension for an additional 15 months to the exception granted to the provisions of Section 3311.29, O.R.C.; and

WHEREAS, this Board does not find good and sufficient cause to approve such high school program or to grant such extension:

NOW, THEREFORE, BE IT RESOLVED that the request of the Board of Education of the Bratenahl Local School District, dated January 28, 1970, be, and the same is, hereby DENIED.

Mr. Wright moved the adoption of the above Resolution. The motion was seconded by Mr. Lyons. Following a discussion of the matter, Mr. Grogan moved for an automatic table. There was no second to his motion. Following further discussion the President called for a voice vote on the motion made by Mr. Wright and seconded by Mr. Lyons. The motion carried. Messrs. Grogan and Miller voted "nay". Mr. Force abstained.

[10] BRATENAHL FEBRUARY 20, 1970 NOTICE OF APPEAL

Case No. 239,508

IN THE COMMON PLEAS COURT
STATE OF OHIO
FRANKLIN COUNTY

BOARD OF EDUCATION OF
BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, SUPERINTENDENT OF
PUBLIC INSTRUCTION,
DEPARTMENT OF EDUCATION OF OHIO,
Appellees.

NOTICE OF APPEAL

Appellant, the party adversely affected by the resolution and order of the State Board of Education of Ohio, Martin Essex, Superintendent of Public Instruction, and the Department of Education of the State of Ohio, hereby gives notice of the appeal from the said resolution and order adopted by said Board, Superintendent, and Department on February 9, 1970, to the Common Pleas Court of Franklin County on questions of law and fact.

Said resolution reads as follows:

"WHEREAS, the Bratenahl Board of Education, on June 8, 1968, resolved that, effective July 1, 1970, the

Bratenahl Local School District would cease to exist and its territory be joined with and made a part of the Cleveland City School District; and

WHEREAS, this Board, by a resolution adopted on June 10, 1968, granted an exception to the Bratenahl Local School District to the provisions of Section 3311.29, O.R.C., for a period of two years; and

WHEREAS, the Bratenahl Board of Education recently submitted a proposal to this Board requesting the approval of a proposed high school program in Bratenahl, and requesting an extension for an additional 15 months to the exception granted to the provisions of Section 3311.29, O.R.C.; and

WHEREAS, this Board does not find good and sufficient cause to approve such high school program or to grant such extension:

NOW, THEREFORE, BE IT RESOLVED that the request of the Board of Education of the Bratenahl Local School District dated January 28, 1970, be and the same is hereby DENIED."

The appeal of said resolution and order is on the grounds that appellant was not afforded a complete and fair hearing on the merits; that said resolution and order was not supported by reliable, substantial and probative evidence; was arbitrary, capricious, unlawful, and against the manifest weight of the evidence; was against public policy; and deprived appellant of a substantive right without due process of law.

/s/ ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio 44115; 696-1144
Attorneys for Appellant

[11] STATUTE AUTHORIZING APPEAL

§ 119.12 Appeal by party adversely affected.

* * * * *

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County, except that appeals from orders of the fire marshal, issued under section 3737.20 of the Revised Code, may be to the court of common pleas of the county in which the building of the aggrieved person is located. (Eff. 9-12-63)

[12] TRIAL COURT APRIL 23, 1970 DECISION DISMISSING BRATENAHL APPEAL

No. 239,508

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellees.

DECISION

Rendered this 23rd day of April, 1970.

MARSHALL, *J*.

Heard on Motion of appellant, filed March 13, 1970, for an order to stay execution of the resolution and order of appellee issued February 9, 1970.

The Resolution of appellee of February 9, 1970, recites the facts. According to resolution of appellants passed June 8, 1968, the appellants resolved to cease to exist and its territory be joined and made a part of the Cleveland City School District, effective July 1, 1970.

On June 10, 1968, the State Board of Education of Ohio passed a resolution, pursuant to Section 3311.29 R.C., granting an exception to appellant, as applied for. Appellant has recently submitted a new proposal to appellee in which it requested a 15-month extension to the exception granted to it pursuant to Section 3311.29 R.C. The new proposal was not approved, appellees stating in its recent Resolution:

> "Whereas, this Board does not find good and sufficient cause to approve such high school program or to grant such extension.
>
> "Now, therefore, be it resolved that the request of the Board of Education of the Bratenahl Local School District dated January 28, 1970, be and the same is hereby denied."

It is from this Resolution of the State Board, adopted February 9, 1970, that appellant is making this appeal, filed herein on February 20, 1970, followed by its Motion for Stay of Execution of said Resolution and order of appellee, filed on March 13, 1970, purporting to be pursuant to Section 119.12 R.C.

On March 24, 1970 appellees filed their motion to dismiss this appeal on the grounds that this court does not have jurisdiction over the subject matter of the appeal.

Appellant asserts that this is a proper appeal under

the Administrative Procedures Act (Sec. 119.12 R.C.) since it is a party adversely affected by an order of an agency issued pursuant to an adjudication.

We are compelled to agree with appellee that there has been no adjudication or order from which appellant may invoke an appeal under the provisions of Section 119.12 R.C. See *Welsh, Appellant vs. Ohio State Medical Board, Appellees,* 168 O.S. 520 wherein the Ohio Supreme Court stated:

> "* * * This section contemplates an appeal from four specific types of adjudication: (1) denial to an applicant of admission to an examination; (2) denial of the issuance of renewal of a license; (3) denial of the registration of a license; and (4) revocation or suspension of a license."

We hold that the resolution of February 9, 1970 made by the State Board was not an adjudication nor was it a final appealable order as contemplated under Section 119.12 R.C.

At its meeting of June 10, 1968, the State Board exercised its discretionary power under Section 3311.29 R.C. to grant an exception, which expires by its express terms on July 1, 1970 and at that time the mandatory provisions of Section 3311.29 R.C. become operable. It was the legislature which determined that as of July 1, 1968 school districts which did not meet the prescribed requirements would not exist. A non-complying school district would either close voluntarily or by order of the Board. The appellant school board was not in compliance with this section of the code on July 1, 1968. As hereinbefore stated it adopted a Resolution on June 8, 1968 in which it resolved to cease to exist effective July 1, 1970 and sought a resolution from appellee, which was adopted on July 10, 1968, granting an exception to appellant for the two year period ending July 1, 1970.

Under this set of circumstances it was appellant which recently requested a 15-month extension to the exception which was denied by appellee by resolution dated February 9, 1970.

There is nothing from which appellants can appeal. The appeal is therefore dismissed.

By its Motion for stay of execution, filed by appellant on March 13, 1970, appellant seeks to stay the action of the State Board taken on February 9, 1970 under the equity powers of this court. Since we have held that the appeal is not proper and is therefore dismissed under the law, we hold there is no proper application for the use of the equity arm of this court under the situation at hand. The motion for stay of execution is therefore OVERRULED.

/s/ GEORGE B. MARSHALL, *Judge*

[13] STATUTE DEFINING "ADJUDICATION"

CHAPTER 119: ADMINISTRATIVE PROCEDURE

§ 119.01 Definitions.

* * * * *

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

* * * * *

[14] COURT OF APPEALS MAY 26, 1970 DECISION GRANTING STAY

No. 9815

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction,
DEPARTMENT OF EDUCATION OF OHIO,
Appellees-Appellees.

DECISION

PER CURIAM.

Following an oral hearing the motion of the appellant, Board of Education of Bratenahl Local School District, for an order to stay execution of an order of the State Board of Education issued February 9, 1970, pending the disposition of the appeal of the local board, appellant, from an order of the Common Pleas Court entered May 15, 1970, was submitted for decision.

A Court of Appeals may grant a restraining order under R. C. 2727.05. In such case R. C. 2727.02 supplies the reasons why an applicant requesting such an order may receive such. Acts producing "great or irreparable injury," or acts occurring during litigation which may result in "rendering the judgment ineffectual," are grounds for a restraining order.

If this appeal be appropriate under R. C. 119.12, which was the question before the Common Pleas Court, and which question is not at this point necessary to be decided, nor is it in any sense decided, an injunction may issue on a showing of "an unusual hardship" to the appellant.

Consummation of the order of the State Board of Education directing that the appellant school district "would cease to exist" on July 1, 1970, which event might well occur before final disposition of this appeal, could render a judgment on the merits ineffectual. Certainly an order accomplishing the demise of a local subdivision could well produce irreparable injury or unusual hardship.

The stay order as requested is granted.

No bond is required under R. C. 2505.12.

Counsel will submit a journal entry incorporating the order as authorized in this decision.

TROOP, *P. J.*, STRAUSBAUGH and STERN, *JJ.*, concur.

[15] COURT OF APPEALS APRIL 27, 1971
DECISION REVERSING TRIAL COURT

No. 9815

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL
LOCAL SCHOOL DISTRICT,

Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction,
DEPARTMENT OF EDUCATION OF OHIO,

Appellees-Appellees.

DECISION

STRAUSBAUGH, *J.*

This is an appeal from an order of the Common Pleas Court dismissing the appeal of appellant Board of Education of Bratenahl Local School District and an overruling of appellant's motion to stay execution of an order of the State Board of Education, finding that the order of the State Board of Education was "* * * not a final appealable order as contemplated under Section 119.12, Revised Code."

The facts as disclosed by the record indicate that the appellant was notified by the State Department of Education that as of July 1, 1968, appellant would be dissolved and its territory joined with another school district under provisions of R. C. 3311.29, which provided that on July 1, 1968:

> "* * * no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.
>
> "The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

On June 8, 1968, the Bratenahl Local School Board passed a resolution requesting an exception for two years from the State Board of Education, based upon a representation that "the Cleveland school buildings and classrooms in the area of Cleveland adjacent to the Bratenahl school district are at the present time overcrowded * * *", and a representation by Dr. Paul Briggs, superintendent of the Cleveland school district, "that many factors need to be considered before a consolidation of the two school districts can be effected." At the same time a second resolution was passed, proposing an integrated program bringing into the Bratenahl school district children of the adjacent portions of the Cleveland school district which were overcrowded.

On June 10, 1968, the State Board of Education agreed by resolution to a two-year exception from the provisions of R. C. 3311.29, the continuation beyond July 1, 1969 being "conditioned upon said school district fully implementing during the 1968-69 school year, the innovative and exemplary program described in the resolution of said board adopted June 8, 1968."

Appellant contends that from 1957 through June 30, 1968, the State Board of Education under the provisions of R. C. 3301.07(D), described regulations specifying 240 pupils as the minimum number of students required for the establishment of a high school; that at no time did the appellant school district contain that number of students; that thereafter the State Board of Education deleted the criteria requiring a minimum number of 240 students and substituted the requirement of at least 55 units of credit as course offerings. Thereafter appellant employed the services of an educational consultant firm to make a feasibility study and plans for a high school to serve the Bratenahl school district, which study and the supporting data became available in November, 1969. Thereafter the appellant submitted the proposal for the high school and at the February 9, 1970 meeting of the State Board of Education appellant requested approval of the proposal for the Bratenahl high school and an additional fifteen months' extension pending implementation of the new high school program. At that meeting the State Board of Education, by resolution, did not "find good and sufficient cause to approve such high school program or to grant such extension * * *", and that "the request of the Board of Education of the Bratenahl Local School District dated January 28, 1970, be and the same is hereby denied."

Appellant further contends that the bond issue and tax levy submitted to the electors of the Bratenahl Local

School District at the May, 1970 election in the amounts recommended by the educational consultant firm to provide for the building of high school facilities and the operation of such facilities were approved by the voters. On March 13, 1970, appellant filed a motion for stay of execution of the resolution and order of the State Board of Education issued February 9, 1970, in the Common Pleas Court of Franklin County, pursuant to R. C. 119.12. Appellees moved to dismiss the appeal on March 24, 1970, on the grounds the court did not have jurisdiction over the subject matter of the appeal. On May 15, 1970, the Common Pleas Court found that the resolution of the State Board of Education on February 9, 1970 is not a final appealable order as contemplated under R. C. 119.12 and ordered the appeal dismissed and motion to stay execution overruled. It is from this order that the appellant conducts this appeal.

Considering the elements required for an appeal under the second paragraph of R. C. 119.12, there is no question but that appellant is a party. Inasmuch as the effect of the February 9, 1970 order of appellees is to put the appellant out of existence, no person could be more "adversely affected." Nor can there be any quarrel that appellee State Board of Education is an "agency." According to R. C. 119.01(D), " 'Adjudication' means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." The highest or ultimate authority of the Ohio Department of Education is the appellee State Board of Education beyond which no further appeal is available or possible by appellant. The order of appellee denying

approval of appellant's proposed high school program and denying appellant's request for an extension for an additional fifteen months to the exception granted by appellee, has the effect of a determination of the "rights, duties, privileges, benefits, or legal relationships" of appellant.

Attention must also be directed to R. C. 3301.13 which provides:

> "* * * In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards the department of education, and any officer or agency therein, shall be subject to chapter 119 of the Revised Code. * * *"

The intent of the legislature to provide review of actions of the State Board of Education is clear.

The matters sought to be reviewed by appellant are quasi judicial in nature rather than quasi legislative in character and therefore reviewable under the criteria laid down by the Supreme Court in *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13.

The Supreme Court in *Welsh v. Board* (1959), 168 Ohio St. 520, laid down four specific types of adjudication contemplated by R. C. 119.12, but nowhere can it be inferred that the court was limiting to these four categories the scope of adjudication subject to judicial review. The subject matter of the appeal in *Welsh* involved the restoration of a license, hence the discussion in the holding of the court involved that subject matter. But the tenor of the opinion is to reject the "narrow interpretation" of R. C. 119.12.

The order of the Common Pleas Court is reversed and remanded for further action.

Reversed and remanded.

TROOP, P. J., and HOLMES, J., concur.

[16] JUNE 14, 1971 STAY OF STATE BOARD ORDERS

Case No. 239,508

IN THE FRANKLIN COUNTY
COMMON PLEAS COURT
COLUMBUS, OHIO

BOARD OF EDUCATION OF
BRATENAHL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION,
Appellees.

ENTRY

This cause came on to be heard on June 14th, 1971 on Motion of Appellant filed June 3, 1971 for an order suspending the order of Appellee, State Board of Education of Ohio, dated June 10, 1968 insofar as such order would require the Bratenahl Local School District to cease to exist or be merged with the Cleveland City School District and suspending any other order of the Appellee, State Board of Education, which would terminate the existence of the Bratenahl School District. Upon consideration, the Court finds the continuance of the order issued by the State Board of Education on June 10, 1968 and any other which would terminate the existence of the Bratenahl Local School District pending the disposition of this appeal could produce great or irreparable injury to appellant and could result in rendering ineffectual a judgment rendered herein. The order as requested is granted subject to the posting with the Clerk of Courts a bond in the amount of $100.00 by appellant.

/s/ J. CRAIG WRIGHT, *Judge*

[19] SUPREME COURT DENIAL OF RESTRAINING ORDER (AUGUST 23, 1971)

No. 71-460

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS

BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION OF OHIO,
Appellant.

ENTRY
(FRANKLIN COUNTY)

This cause is pending before this court on a motion to certify the record of the Court of Appeals of Franklin County. Coming now to consider the appellant's motion for a restraining order, the appellant's memorandum in support of such motion, and the appellee's memorandum opposing such motion, it is hereby ORDERED, that the motion for a restraining order be, and the same hereby is, denied.

/s/ C. WILLIAM O'NEILL
Chief Justice

[22] SUPREME COURT DENIAL OF REVIEW (SEPTEMBER 22, 1971)

No. 71-460

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS

BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION OF OHIO,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

[23] TRIAL COURT APRIL 3, 1972
DISMISSAL OF APPEAL

Case No. 239,508

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION OF OHIO, *et al.*,
Appellees.

DECISION

MARSHALL, *J.*

Heard on motion of appellees, filed November 26, 1971, to dismiss this Appeal as moot, or in the alternative, to modify the suspension order of June 14, 1971.

As to the Motion to Dismiss as moot, we hold as follows:

According to the Resolution passed by appellant on June 8, 1968, it resolved to cease to exist and its territory be joined and made a part of the Cleveland City School District, effective July 1, 1970. This was in contemplation of Section 3311.29, Revised Code, which provided that on July 1, 1968, no school district shall exist which does not maintain public schools consisting of grades one through twelve, unless the State Board did, by Resolution, grant an exception of two years, as applied for. Before July 1, 1970, appellant requested an additional extension of 15 months, but this was denied by the State Board on February 9, 1970. It is from that resolution of refusal to grant additional time that the Appeal in this case was filed on February 20, 1970.

The action of the State Board, of June 10, 1968, granting a two-year postponement of the dissolution of the local school district and the transfer of its territory to the Cleveland City School District, had limiting factors in its Resolution, namely: "not to extend beyond July 1, 1970," and "said district shall cease to exist effective July 1, 1970." No attempt was made to appeal said action of the State Board.

In their briefs the parties infer certain subsequent facts developing after this appeal was filed, after the July 1, 1970 deadline had passed, and continuing up to the present time. These developing facts cannot throw light on allegations made in the Notice of Appeal, filed February 20, 1970, that in the adoption of the Resolution by appellees, the appellant was not afforded

> "a complete and fair hearing on the merits; that said Resolution and order was not supported by reliable, substantial and probative evidence; was arbitrary, capricious, unlawful, and against the manifest weight of the evidence, . . ."

An Entry of Dismissal of this appeal filed May 15, 1970 was reversed and remanded by the Court of Appeals by Judgment Entry of May 27, 1971, in Case No. 9815.

On June 14, 1971, Judge Wright of this Court signed an Agreed Entry sustaining appellant's motion, filed June 3, 1971, which suspended the order of appellees dated June 10, 1968 insofar as it would require the Bratenahl Local School District to cease to exist during the pendency of this appeal. Were it not for said Entry, the Bratenahl Local School District would no longer exist, after July 1, 1970, by action of the State Board taken June 10, 1968.

Another case, No. 247,705, is pending in this Court, filed on November 29, 1971 by the Board of Education, Bratenahl Local School District against State Board of Education of Ohio, *et al.*, seeking declaratory judgment and other relief, including summary judgment.

We hold that this Appeal is moot and that appellees' motion to dismiss is well taken and is SUSTAINED.

GEORGE B. MARSHALL, *Judge*

[24] COURT OF APPEALS SEPTEMBER 6, 1972 REINSTATEMENT OF STAY ORDERS

No. 72AP-269 and No. 72AP-270

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction,
DEPARTMENT OF EDUCATION OF OHIO,
Appellees-Appellees.

ENTRY

These cases are before the court upon motions of appellant, Board of Education of Bratenahl Local School District, to consolidate cases 72AP-269 and 72AP-270 and for an order staying enforcement of the judgments appealed from.

The court finds that the motion to consolidate is well taken, and it is ordered that the appeals in cases 72AP-269 and 72AP-270 be consolidated.

The court further finds that these appeals involve complex legal issues involving *inter alia* the interpretation of R. C. 3311.29, the legal effect of certain orders of the State Board of Education, a determination of the rights, duties, privileges, benefits, legal relationships, and legal existence of appellant, and a determination of whether the judgments of the trial court are consistent with the judgment of this court rendered upon a prior appeal to this court, all of which issues may become moot during the pendency of this appeal if no temporary relief is granted which could result in rendering ineffectual any judgment rendered herein.

It is, therefore, ordered, adjudged and decreed that during the pendency of these appeals, and until further order of the court, the judgments of the trial court are stayed, that the order of suspension entered by the trial court on June 14, 1971, is reinstated and continued, and that the appellee State Board of Education is enjoined from enforcing any orders in existence which purport to affect the legal existence of appellant Board of Education of Bratenahl Local School District.

No further bond, in addition to that posted upon the order of suspension entered by the trial court on June 14, 1971, is required.

/s/ HORACE W. TROOP

/s/ ALBA L. WHITESIDE

/s/ ARCHER E. REILLY
Judges

[25] COURT OF APPEALS JANUARY 9, 1973 DECISION REVERSING TRIAL COURT

No. 72AP-269 and No. 72AP-270

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION BRATENAHL
LOCAL SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction,
DEPARTMENT OF EDUCATION OF OHIO,
Defendants-Appellees.

DECISION

PER CURIAM.

These appeals, consolidated by prior order of this court, are from judgments of the Franklin County Court of Common Pleas dismissing both actions upon the grounds that the issues are moot. Case No. 72AP-270 involves an appeal to the trial court from an order of the State Board of Education and case No. 72AP-269 involves an action for declaratory judgment involving similar issues. For simplicity the parties will hereafter be referred to as Bratenahl and State Board respectively.

R. C. 3311.29 was amended effective December 1, 1967, to provide that after July 1, 1968, no school district should exist which did not maintain within the district public schools consisting of grades 1 through 12, but authorized the State Board to permit exceptions under specified conditions. At that time Bratenahl did not maintain a high school within the district and could not do so because of State Board requirements that a high school must have a minimum of 240 students. By resolution of the State Board adopted June 10, 1968, Bratenahl was granted a 2-year exception from the provisions of R. C. 3311.29, after which Bratenahl was to be merged with the Cleveland City School District.

Thereafter the State Board modified the requirements for high schools and eliminated the 240-minimum-student requirement substituting other requirements therefor so that it was possible for Bratenahl to establish a high school within the district under the new State Board standards. Bratenahl then proceeded with the making of a feasibility study and plans for a high school to serve the Bratenahl district. Bratenahl then applied to the State Board for a further exception to R. C. 3311.29 for a period of 15 months and for authorization to establish a high school effective in September 1971. The State Board denied this request on February 9, 1970. Bratenahl appealed this order to the trial court pursuant to R. C. 119.12.

The trial court, upon motion of the State Board, dismissed the appeal upon the grounds that the order of February 9, 1970, was not a final appealable order. Bratenahl thereupon appealed to this court in case No. 9815. This court, by entry of June 10, 1970, granted a stay of execution to Bratenahl. On May 27, 1971, this court rendered judgment reversing the dismissal by the trial court and remanding the case to that court for further proceedings in accordance with the decision rendered therein on April 27, 1971. The State Board appealed to the Supreme Court which, on August 23, 1971, overruled a motion of the State Board for a restraining order and, on October 5, 1971, overruled the State Board's motion to certify. On

June 14, 1971, the trial court, acting pursuant to the mandate of this court, in case No. 9815, suspended any order of the State Board "which would terminate the existence of the Bratenahl School District."

Thereafter, on November 29, 1971, Bratenahl filed its complaint for declaratory judgment which is the subject of the appeal in case No. 72AP-269. On November 26, 1971, the State Board filed a motion to dismiss the appeal pending in the trial court upon the grounds that the issue had become moot. On December 27, 1971, the State Board filed a motion to dismiss the complaint in the declaratory judgment action. In support of such motions, the State Board raised essentially the same arguments that it had raised in this court on appeal in case No. 9815 except the argument that R. C. 119.12 does not apply to the State Board, substituting the contention that these facts rendered the appeal moot rather than that there was no final appealable order.

On August 14, 1972, the trial court entered judgment in both cases sustaining both motions to dismiss for the reasons stated in a decision rendered April 3, 1972, in the appeal case and April 29, 1972, in the declaratory judgment action.

Bratenahl appealed the judgments to this court and, on September 6, 1972, this court granted a further stay order. Bratenahl raises three assignments of error as follows:

> "1. In dismissing the administrative appeal originally filed by this Appellant February 20, 1970 (Common Pleas Case No. 239,508);
>
> "2. In dismissing the declaratory judgment action filed by this Appellant November 29, 1971 (Common Pleas Case No. 247,705);
>
> "3. In interpreting R. C. 3311.29; in determining the legal effect of certain orders of the State Board of Education, and the effect thereof upon the rights, duties, privileges, benefits, legal relationships and legal existence of this Appellant; and in determining whether the judgments of the trial court are consistent with the judgment of the Court of Appeals of Franklin County entered May 27, 1971 in Case No. 9815, upon a prior appeal in this same case, based upon an unreported decision rendered by this Court April 27, 1971."

Broken down into simplest terms, the contentions of the State Board that these actions are moot are predicated upon (1) a contention that R. C. 3311.29 is self-executing to the extent that Bratenahl no longer exists and (2) the 2-year exception granted by the State Board order June 10, 1968, has expired as of July 1, 1970 and therefore Bratenahl has ceased to exist. Essentially the same arguments were made to this court in the prior appeal and rejected by this court, although at that time the State Board contended that this was a basis for there being no final appealable order. Furthermore, a comparison of the decisions rendered by the trial court in first dismissing the appeal on the grounds that there was no final appealable order and then dismissing the appeal upon the grounds that it is moot after reversal by this court, indicate that the two decisions are predicated upon the same reasoning; the only difference being that the date of July 1, 1970, has come and gone in the interim.

Both the State Board's arguments and the trial court's decision fail to take cognizance of the effect of the stay of executions granted by this court and by the trial court pursuant to the mandate of this court. One of the errors assigned to this court upon the prior appeal in case No. 9815 was the denial of such a stay and this court reversed the entire judgment, including the denial of that stay.

In the decision rendered June 6, 1972 in *State, ex rel. Drumm, v. Civil Service Commission,* unreported case No. 72AP-41, this court stated that:

> "An action may become moot when an occurrence during the pendency of the action renders it impossible to render any effective judgment leaving only purely academic or abstract questions. Under such circumstances, an appeal or an action must be dismissed because no effective judgment can be rendered by the court. An action does not ordinarily become moot, however, merely because of the passage of time but rather some occurrence must intervene which renders it impossible to render an effective judgment."

The State Board's contention that these actions are moot is predicated upon the mere passage of time. The only occurrences in the interim are the granting of the stay orders by this court and the trial court, the judgments rendered by this court in case No. 9815 upon the prior appeal, and the orders of the Supreme Court upon the appeal to that court, and the establishment by Bratenahl of a high school, apparently without State Board approval. None of these intervening occurrences render these actions moot, but rather all of them tend to indicate the continued existence of the legal issues involved and the necessity of their judicial resolution.

R. C. 3311.29 is not self-executing. This is clearly indicated by the provisions thereof for exceptions being granted by the State Board and the requirements of orders or voluntary agreements. It is further indicated by the last paragraph thereof which provides that:

> "The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

Obviously, that section recognizes that school districts may, contrary to this section, in fact continue to exist after July 1, 1968, which do not maintain a high school and to which no exception has been granted by the State Board. If R. C. 3311.29 were self-executing this paragraph would be meaningless and pure surplusage.

Furthermore, Bratenahl in fact does exist and is operating as a school district and, at present, maintains schools with grades 1 through 12 inclusive, but without State Board sanction, and even though the exception granted by the State Board has expired. These cases involve, *inter alia*, the determination of the legal effect of such continued existence, as well as a determination of whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains.

The trial court in dismissing the appeal as moot acted inconsistently with the mandate of this court upon the prior appeal in case No. 9815. The mandate of this court was to pursue further proceedings consistent with the opinion rendered April 27, 1971. In that decision this court stated that "* * * the effect of the February 9, 1970 order of appellees is to put the appellant out of existence * * *." This court further stated that "The order of appellee denying approval of appellant's proposed high school program and denying appellant's request for an extension for an additional fifteen months to the exception granted by appellee, has the effect of a determination of the 'rights, duties, privileges, benefits, or legal relationships' of appellant." That mandate contemplated a determination of the appeal upon its merits.

Apparently, however, the mandate of this court was not sufficiently clear to the trial court. Accordingly, we

will attempt to be more explicit herein. In its notice of appeal to the trial court, Bratenahl stated that the grounds of the appeal from the State Board were that "appellant was not afforded a complete and fair hearing on the merits; that said resolution and order was not supported by reliable, substantial and probative evidence; was arbitrary, capricious, unlawful, and against the manifest weight of the evidence; was against public policy; and deprived appellant of a substantive right without due process of law." Bratenahl contends that it was not afforded a proper hearing in accordance with R. C. 119.06 to 119.10.

The hearing upon appeal to the trial court is controlled by R. C. 119.12. The appeal shall be heard upon the record as certified by the State Board and such additional evidence as "is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before" the State Board if a request for the admission of such evidence is made and granted by the trial court. The determination of the trial court must be predicated upon the record and such additional evidence, if any, as the trial court admits, and must be whether the order of the State Board "is supported by reliable, probative and substantial evidence and is in accordance with law." If no proper hearing was held so that there is no evidence in the record, then the order would not be so supported and remand for a proper hearing might be required. See *Arcaro Bros. Builders, Inc., v. Zoning Board of Appeals* (1966), 7 Ohio St. 2d 32.

It is unfortunate that this litigation has been so prolonged and a determination of the merits so long delayed. However, this has not resulted from a lack of diligence by Bratenahl in prosecuting the matter.

Rather, it has resulted from the persistence of the

State Board in its efforts to avoid determination upon the merits of the appeal by the repeated motions to dismiss which, although the State Board had a complete right to make them, have resulted in the prolonged delay.

For the foregoing reasons, the judgments of the Franklin County Court of Common Pleas are reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remanded.

HOLMES, WHITESIDE and REILLY, *JJ.*, concur.

[26] SUPREME COURT APRIL 20, 1973
DENIAL OF REVIEW

No. 73-206

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

[27] TRIAL COURT AUGUST 8, 1973 DECISION VACATING FEBRUARY 9, 1970 STATE BOARD ORDER

Case No. 239,508

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION,
Appellee.

DECISION

SHOEMAKER, *J.*

Upon consideration of the record in this case, the Court makes the following rulings:

1. The State Board of Education is an agency governed by the Ohio Administrative Procedure Act, R. C. Chapter 119. This was the holding of the Franklin County Court of Appeals in its opinions of May 27, 1971 and January 9, 1973, in this case and its companion and also the express provision of R. C. Section 3301.13.

2. The request of Appellant Bratenahl for the admission of "newly discovered evidence" is DENIED. The term "newly discovered evidence" as used in R. C. Section 119.12 only encompasses evidence in existence at the time the agency made its decision, not evidence of later events. Such evidence would, however, be admissible at a subsequent Chapter 119 hearing.

3. The State Board of Education did not hold a proper Chapter 119 hearing in this matter, as evidenced by the Minutes of the State Board's February 9, 1970 meeting.

4. The State Board failed to comply with the requirements of R. C. Section 119.12 when the State Board failed to file a transcript of the tape recording made of the February 9, 1970 meeting.

5. The February 9, 1970 Resolution of the State Board of Education, the subject of this appeal, is hereby VACATED as that decision was reached without a proper Chapter 119 hearing.

Counsel for Appellant may prepare an Entry consistent with this decision.

/s/ FRED J. SHOEMAKER, *Judge*

[28] TRIAL COURT JUDGMENT AUGUST 24, 1973 VACATING FEBRUARY 9, 1970, STATE BOARD ORDER

Case No. 239,508

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant,

v.

STATE BOARD OF EDUCATION, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on for consideration upon the record in this case, and upon consideration of same, the Court finds, for the reasons stated in the decision of this Court rendered herein on August 8, 1973, that the request of Appellant Bratenahl for the admission herein of "newly discovered evidence" is not well taken and it is, therefore, DENIED; and that the February 9, 1970, Resolution of the State Board of Education, the subject of this appeal, was reached without a proper Chapter 119 hearing and is, therefore, VACATED.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED, that the February 9, 1970, Resolution of the State Board of Education is hereby VACATED.

Exceptions are reserved to Appellees.

/s/ FRED J. SHOEMAKER, *Judge*

[29] DECLARATORY JUDGMENT COMPLAINT

(Filed November 29, 1971)

Case No. 247,705

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO
COLUMBUS, OHIO

BOARD OF EDUCATION
BRATENAHL LOCAL SCHOOL DISTRICT
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO
MARTIN ESSEX, Superintendent of Public Instruction
DEPARTMENT OF EDUCATION OF OHIO
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT
AND OTHER RELIEF

This Declaratory Judgment action is brought pursuant to Rule 57 O.R.C.P., R.C. 2721.06 and R.C. 2721.02.

1. Plaintiff Board of Education of the Bratenahl Local School District is a duly elected and constituted body politic and corporate and, as such, is authorized and required to maintain public schools within that district. (See R.C. 3313.17)

2. Defendant State Board of Education of Ohio is the duly elected and constituted authority for the general supervision of the system of public education in the State of Ohio. (See R.C. 3301.07)

3. Defendant Martin Essex is the duly appointed and serving Superintendent of Public Instruction, having been so appointed by the State Board of Education. His duties as Superintendent of Public Instruction are prescribed by law, including, but not limited to, R.C. 3301.12.

4. Defendant Department of Education is the duly created and existing administrative unit and organization through which the policies, directives and powers of the State Board of Education and the duties of the Superintendent of Public Instruction are administered by such Superintendent, as executive officer of the Board. (See R.C. 3301.13)

5. A controversy exists because of the refusal of all Defendants to:

a. Recognize the rights, status and other legal relations of Plaintiff Bratenahl Local School District to operate as a duly constituted public school district, maintaining, within its district, grades kindergarten through twelve, inclusive; and

b. Provide technical and professional assistance and advice to Plaintiff school district in relation to the aspects of education relative to the maintenance of a four-year high school within that district, and particularly with respect to matters of administration, curriculum and instruction and the interpretation of school laws and state regulations, all as required under R.C. 3301.12.

6. Such controversy relates particularly to the interpretation of R.C. 3311.29, a section of the Revised Code of Ohio which, to date, has never been authoritatively interpreted by a court of record.

7. It is the belief and contention of Plaintiff School District that regardless of whatever legal effect R.C.

3311.29 may have upon any Ohio public school district which does not maintain within its district public schools consisting of at least grades one through twelve, inclusive; that section has no application to Plaintiff School District which does maintain within its district, as all Defendants have been informed, public schools consisting of grades kindergarten through twelve, inclusive.

WHEREFORE, Plaintiff Bratenahl Local School District prays that this Court determine, declare and decide the present rights and status of Plaintiff School District under R.C. 3311.29, and as a part thereof that this Court specifically declare and decide; now that Plaintiff School District does maintain within its district grades kindergarten through twelve, inclusive; that:

1. Plaintiff School District is not subject to the provisions of R.C. 3311.29; and

2. Defendant Martin Essex, as Superintendent of Public Instruction, and Defendant Department of Education of Ohio are authorized and required under R.C. 3301.12 and 3301.13 to provide technical and professional assistance and advice to Plaintiff School District in reference to all aspects of its educational program and that Plaintiff have such other relief as the Court may deem proper.

Further, pursuant to Rule 57 O.R.C.P., the Court is respectfully requested to advance this Complaint for Declaratory Judgment on the trial list, for trial on a date certain to be determined by the Court.

CHESTER, HOFFMAN, PARK, WILCOX & ROSE
By: CHARLES S. LOPEMAN

ARTER & HADDEN
By: WILLIAM S. BURTON
Attorneys for Plaintiff,
Board of Education
Bratenahl Local School District

[30] STATUTE REQUIRING TECHNICAL ASSISTANCE

§ 3301.12 Other duties of superintendent of public instruction.

The superintendent of public instruction in addition to the authority otherwise imposed on him, shall perform the following duties:

A. He shall provide technical and professional assistance and advice to all school districts in reference to all aspects of education, including finance, buildings and equipment, administration, organization of school districts, curriculum and instruction, transportation of pupils, personnel problems, and the interpretation of school laws and state regulations.

* * * * *

(Eff. 1-3-56)

[31] STATUTE PROVIDING FOR APPEAL OF ALL STATE BOARD ACTIONS

§ 3301.13 Duties, powers, and organization.

The department of education hereby created, shall be the administrative unit and organization through which the policies, directives, and powers of the state board of education and the duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board.

* * * * *

The department of education shall be subject to all provisions of law pertaining to departments, offices, or institutions established for the exercise of any function of the state government; excepting that it shall not be one of the departments provided for under division (A) of section 121.01 of the Revised Code. In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards the department of education, and any officer or agency therein, shall be subject to Chapter 119. of the Revised Code. The headquarters of the department of education shall be at the seat of government, where office space suitable and adequate for the work of the department shall be provided by the appropriate state agency. There the state board of education shall meet, transact its business, and keep its records: and there the records, papers, and documents belonging to the department shall be kept in charge of the superintendent of public instruction.

* * * * *

(Eff. 7-22-65)

[32] TRIAL COURT APRIL 29, 1972, DECISION DISMISSING DECLARATORY JUDGMENT ACTION

Case No. 247,705

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO, MARTIN ESSEX, Superintendent of Public Instruction, DEPARTMENT OF EDUCATION OF OHIO,
Defendants.

DECISION

Rendered this 29th day of April, 1972.

MARSHALL, J.

On April 3, 1972 this branch of the Court in Case 239,508 made a decision on the appellees' motion, filed November 26, 1971, and dismissed the appeal in that case as being moot. We, accordingly sustained appellees' motion to dismiss the appeal. In that decision we made several findings. For example, we found that the Board of Education of Bratenahl Local School District passed a Resolution on June 8, 1968 in which it resolved to cease to exist and its territory be joined and made a part of the Cleveland City School District, effective July 1, 1970. This was in contemplation of Section 3311.29, R.C. which provided that on July 1, 1968 no school district shall exist which does not maintain public schools consisting of

grades one through twelve, unless the State Board by Resolution, granted an exception of two years.

The exception of two years was approved by the State Board. Within said two-year exception period, and prior to the July 1, 1970 termination date, the Appellant school board applied for an additional extension of 15 months but this was denied by the State Board. But for the restraining order of Judge Wright on June 14, 1971, in Case 239,508, the Bratenahl Local School District would have been terminated on July 1, 1970, under the provisions of Section 3311.29, R.C. and according to Appellants Resolution of June 8, 1968.

The instant case was filed on November 29, 1971, seeking Declaratory Judgment. It was first assigned to Judge Rader. On December 27, 1971 defendants filed their Motion to Dismiss the Complaint. Before any ruling was made thereon the instant case was transferred to this branch of the Court for trial or other disposition, under our Rule 27.01.

Defendants filed their Motion to Dismiss the Complaint in the instant case on December 27, 1971, asserting that said Complaint failed to state a claim upon which relief could be granted.

Section 3311.29, R.C. is clear and unambiguous. It applied to the Bratenahl Local School District which on the crucial date of July 1, 1968 did not maintain grades one through twelve. It did not even qualify during the two year period of extension, expiring July 1, 1970, the date the Bratenahl Board by resolution recognized as the date it would "cease to exist and its territory will be joined with and made a part of the Cleveland City School District."

The Complaint does not state facts which would warrant the continuance of the Bratenahl Local School Dis-

trict beyond July 1, 1970. The claim of conditions existing today does not put new life into a district which ceased to exist as of July 1, 1970. We repeat what we said once before, that it was the legislature which determined that, as of July 1, 1968, school districts which did not meet the prescribed requirements would not exist. See Section 3311.29, R.C.

For the sake of brevity and convenience we hereby repeat by reference our decision made on April 3, 1972, in Case 239,508 as though set forth in full herein.

Although the proceedings in these two cases are different in form the parties are the same and both proceedings arise from the same controversy and involve the same basic facts. Our rulings in these two cases should terminate the controversies which have arisen and persisted between the parties, and allow the early transfer of the dissolved Bratenahl Local School District, as provided by law.

The Complaint is hereby dismissed. The parties are hereby released from restraining orders made in either case 239,508 or in this case, which are hereby terminated.

GEORGE B. MARSHALL, *Judge*

[34] COURT OF APPEALS SEPTEMBER 6, 1972, ENTRY IN DECLARATORY JUDGMENT ACTION

No. 72AP-269 and No. 72AP-270

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION OF BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction,
DEPARTMENT OF EDUCATION OF OHIO,
Appellees-Appellees.

ENTRY

These cases are before the court upon motions of appellant, Board of Education of Bratenahl Local School District, to consolidate cases 72AP-269 and 72AP-270 and for an order staying enforcement of the judgments appealed from.

The court finds that the motion to consolidate is well taken, and it is ordered that the appeals in cases 72AP-269 and 72AP-270 be consolidated.

The court further finds that these appeals involve complex legal issues involving *inter alia* the interpretation of R. C. 3311.29, the legal effect of certain orders of the State Board of Education, a determination of the rights, duties, privileges, benefits, legal relationships, and legal existence of appellant, and a determination of whether the judgments of the trial court are consistent with the

judgment of this court rendered upon a prior appeal to this court, all of which issues may become moot during the pendency of this appeal if no temporary relief is granted which could result in rendering ineffectual any judgment rendered herein.

It is, therefore, ordered, adjudged and decreed that during the pendency of these appeals, and until further order of the court, the judgments of the trial court are stayed, that the order of suspension entered by the trial court on June 14, 1971, is reinstated and continued, and that the appellee State Board of Education is enjoined from enforcing any orders in existence which purport to affect the legal existence of appellant Board of Education of Bratenahl Local School District.

No further bond, in addition to that posted upon the order of suspension entered by the trial court on June 14, 1971, is required.

/s/ HORACE W. TROOP

/s/ ALBA L. WHITESIDE

/s/ ARCHER E. REILLY
Judges

[35] COURT OF APPEALS JANUARY 9, 1973, DECISION REVERSING TRIAL COURT DISMISSAL OF DECLARATORY JUDGMENT ACTION

No. 72AP-269 and No. 72AP-270

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION BRATENAHL
LOCAL SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction
DEPARTMENT OF EDUCATION OF OHIO,
Defendants-Appellees.

DECISION
Rendered on January 9, 1973

PER CURIAM.

These appeals, consolidated by prior order of this court, are from judgments of the Franklin County Court of Common Pleas dismissing both actions upon the grounds that the issues are moot. Case No. 72AP-270 involves an appeal to the trial court from an order of the State Board of Education and case No. 72AP-269 involves an action for declaratory judgment involving similar issues. For simplicity the parties will hereafter be referred to as Bratenahl and State Board respectively.

R. C. 3311.29 was amended effective December 1, 1967, to provide that after July 1, 1968, no school district should exist which did not maintain within the district public schools consisting of grades 1 through 12, but authorized the State Board to permit exceptions under specified conditions. At that time Bratenahl did not maintain a high school within the district and could not do so because of State Board requirements that a high school must have a minimum of 240 students. By resolution of the State Board adopted June 10, 1968, Bratenahl was granted a 2-year exception from the provisions of R. C. 3311.29, after which Bratenahl was to be merged with the Cleveland City School District.

Thereafter the State Board modified the requirements for high schools and eliminated the 240-minimum-student requirement substituting other requirements therefor so that it was possible for Bratenahl to establish a high school within the district under the new State Board standards. Bratenahl then proceeded with the making of a feasibility study and plans for a high school to serve the Bratenahl district. Bratenahl then applied to the State Board for a further exception to R. C. 3311.29 for a period of 15 months and for authorization to establish a high school effective in September 1971. The State Board denied this request on February 9, 1970. Bratenahl appealed this order to the trial court pursuant to R. C. 119.12.

The trial court, upon motion of the State Board, dismissed the appeal upon the grounds that the order of February 9, 1970, was not a final appealable order. Bratenahl thereupon appealed to this court in case No. 9815. This court, by entry of June 10, 1970, granted a stay of execution to Bratenahl. On May 27, 1971, this court rendered judgment reversing the dismissal by the trial court and remanding the case to that court for further proceedings

in accordance with the decision rendered therein on April 27, 1971. The State Board appealed to the Supreme Court which, on August 23, 1971, overruled a motion of the State Board for a restraining order and, on October 5, 1971, overruled the State Board's motion to certify. On June 14, 1971, the trial court, acting pursuant to the mandate of this court, in case No. 9815, suspended any order of the State Board "which would terminate the existence of the Bratenahl School District."

Thereafter, on November 29, 1971, Bratenahl filed its complaint for declaratory judgment which is the subject of the appeal in case No. 72AP-269. On November 26, 1971, the State Board filed a motion to dismiss the appeal pending in the trial court upon the grounds that the issue had become moot. On December 27, 1971, the State Board filed a motion to dismiss the complaint in the declaratory judgment action. In support of such motions, the State Board raised essentially the same arguments that it had raised in this court on appeal in case No. 9815 except the argument that R. C. 119.12 does not apply to the State Board, substituting the contention that these facts rendered the appeal moot rather than that there was no final appealable order.

On August 14, 1972, the trial court entered judgment in both cases sustaining both motions to dismiss for the reasons stated in a decision rendered April 3, 1972, in the appeal case and April 29, 1972, in the declaratory judgment action.

Bratenahl appealed the judgments to this court and, on September 6, 1972, this court granted a further stay order. Bratenahl raises three assignments of error as follows:

> "1. In dismissing the administrative appeal originally filed by this Appellant February 20, 1970 (Common Pleas Case No. 239,508);

"2. In dismissing the declaratory judgment action filed by this Appellant November 29, 1971, (Common Pleas Case No. 247,705);

"3. In interpreting R. C. 3311.29; in determining the legal effect of certain orders of the State Board of Education, and the effect thereof upon the rights, duties, privileges, benefits, legal relationships and legal existence of this Appellant; and in determining whether the judgments of the trial court are consistent with the judgment of the Court of Appeals of Franklin County entered May 27, 1971 in Case No. 9815, upon a prior appeal in this same case, based upon an unreported decision rendered by this Court April 27, 1971."

Broken down into simplest terms, the contentions of the State Board that these actions are moot are predicated upon (1) a contention that R. C. 3311.29 is self-executing to the extent that Bratenahl no longer exists and (2) the 2-year exception granted by the State Board order June 10, 1968, has expired as of July 1, 1970 and therefore Bratenahl has ceased to exist. Essentially the same arguments were made to this court in the prior appeal and rejected by this court, although at that time the State Board contended that this was a basis for there being no final appealable order. Furthermore, a comparison of the decisions rendered by the trial court in first dismissing the appeal on the grounds that there was no final appealable order and then dismissing the appeal upon the grounds that it is moot after reversal by this court, indicate that the two decisions are predicated upon the same reasoning; the only difference being that the date of July 1, 1970, has come and gone in the interim.

Both the State Board's arguments and the trial court's decision fail to take cognizance of the effect of the stay of executions granted by this court and by the trial court pursuant to the mandate of this court. One of the errors

assigned to this court upon the prior appeal in case No. 9815 was the denial of such a stay and this court reversed the entire judgment, including the denial of that stay.

In the decision rendered June 6, 1972, in *State, ex rel. Drumm, v. Civil Service Commission*, unreported case No. 72AP-41, this court stated that:

"An action may become moot when an occurrence during the pendency of the action renders it impossible to render any effective judgment leaving only purely academic or abstract questions. Under such circumstances, an appeal or an action must be dismissed because no effective judgment can be rendered by the court. An action does not ordinarily become moot, however, merely because of the passage of time but rather some occurrence must intervene which renders it impossible to render an effective judgment."

The State Board's contention that these actions are moot is predicated upon the mere passage of time. The only occurrences in the interim are the granting of the stay orders by this court and the trial court, the judgments rendered by this court in case No. 9815 upon the prior appeal, and the orders of the Supreme Court upon the appeal to that court, and the establishment by Bratenahl of a high school, apparently without State Board approval. None of these intervening occurrences render these actions moot, but rather all of them tend to indicate the continued existence of the legal issues involved and the necessity of their judicial resolution.

R. C. 3311.29 is not self-executing. This is clearly indicated by the provisions thereof for exceptions being granted by the State Board and the requirements of orders or voluntary agreements. It is further indicated by the last paragraph thereof which provides that:

"The superintendent of public instruction is without authority to distribute funds under sections 3317.02

and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

Obviously, that section recognizes that school districts may, contrary to this section, in fact continue to exist after July 1, 1968, which do not maintain a high school and to which no exception has been granted by the State Board. If R. C. 3311.29 were self-executing this paragraph would be meaningless and pure surplusage.

Furthermore, Bratenahl in fact does exist and is operating as a school district and, at present, maintains schools with grades 1 through 12 inclusive, but without State Board sanction, and even though the exception granted by the State Board has expired. These cases involve, *inter alia*, the determination of the legal effect of such continued existence, as well as a determination of whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains.

The trial court in dismissing the appeal as moot acted inconsistently with the mandate of this court upon the prior appeal in case No. 9815. The mandate of this court was to pursue further proceedings consistent with the opinion rendered April 27, 1971. In that decision this court stated that "* * * the effect of the February 9, 1970 order of appellees is to put the appellant out of existence * * *." This court further stated that "The order of appellee denying approval of appellant's proposed high school program and denying appellant's request for an extension for an additional fifteen months to the exception granted by appellee, has the effect of a determination of the 'rights, duties, privileges, benefits, or legal relationships of appellant." That mandate contemplated a determination of the appeal upon its merits.

Apparently, however, the mandate of this court was not sufficiently clear to the trial court. Accordingly, we will attempt to be more explicit herein. In its notice of appeal to the trial court, Bratenahl stated that the grounds of the appeal from the State Board were that "appellant was not afforded a complete and fair hearing on the merits; that said resolution and order was not supported by reliable, substantial and probative evidence; was arbitrary, capricious, unlawful, and against the manifest weight of the evidence; was against public policy; and deprived appellant of a substantive right without due process of law." Bratenahl contends that it was not afforded a proper hearing in accordance with R. C. 119.06 to 119.10.

The hearing upon appeal to the trial court is controlled by R. C. 119.12. The appeal shall be heard upon the record as certified by the State Board and such additional evidence as "is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before" the State Board if a request for the admission of such evidence is made and granted by the trial court. The determination of the trial court must be predicated upon the record and such additional evidence, if any, as the trial court admits, and must be whether the order of the State Board "is supported by reliable, probative and substantial evidence and is in accordance with law." If no proper hearing was held so that there is no evidence in the record, then the order would not be so supported and remand for a proper hearing might be required. See *Arcaro Bros. Builders, Inc., v. Zoning Board of Appeals* (1966), 7 Ohio St. 2d 32.

It is unfortunate that this litigation has been so prolonged and a determination of the merits so long delayed.

However, this has not resulted from a lack of diligence by Bratenahl in prosecuting the matter.

Rather, it has resulted from the persistence of the State Board in its efforts to avoid determination upon the merits of the appeal by the repeated motions to dismiss which, although the State Board had a complete right to make them, have resulted in the prolonged delay.

For the foregoing reasons, the judgments of the Franklin County Court of Common Pleas are reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remanded.

HOLMES, WHITESIDE and REILLY, JJ., concur.

[36] SUPREME COURT APRIL 20, 1973 DENIAL OF REVIEW OF REINSTATEMENT OF DECLARATORY JUDGMENT ACTION

No. 73-206

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR FRANKLIN COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

[37] TRIAL COURT AUGUST 8, 1973 DECISION GRANTING SUMMARY JUDGMENT IN DECLARATORY JUDGMENT ACTION

Case No. 247,705

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION, *et al.*,
Appellee,

DECISION

Rendered this 8th day of August, 1973.

SHOEMAKER, *J.*

This matter comes before the Court on Plaintiff Bratenahl's motion for summary judgment in this declaratory judgment action. Upon consideration of the record in this case, the Court finds that there is no genuine issue as to any material fact and that Bratenahl, the moving party, is entitled to judgment as a matter of law. The Franklin County Court of Appeals, in its Decision in this case rendered on January 9, 1973, held that R. C. Section 3311.29 is not self-executing, and Bratenahl Local School District does legally exist. Bratenahl Local School District is therefore entitled to technical and professional assistance under R. C. Section 3301.12 and R. C. Section 3301.13.

Plaintiff Bratenahl's motion for summary judgment is SUSTAINED. Counsel for Plaintiff may prepare an Entry consistent with this decision.

/s/ FRED J. SHOEMAKER, *Judge*

[38] TRIAL COURT AUGUST 30, 1973, JUDGMENT IN DECLARATORY JUDGMENT ACTION

Case No. 247,705

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO, *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came on to be heard on the motion of plaintiff, Bratenahl Local School District, for summary judgment. The Court having considered said motion and the record herein finds as follows:

1. The Franklin County Court of Appeals, in a decision rendered January 9, 1973, held that Revised Code Section 3311.29 is not self-executing.
2. The Franklin County Common Pleas Court, in a companion case, No. 239,508, involving these same parties, has held that the State Board of Education did not hold a proper Chapter 119 hearing when it denied, on February 9, 1970, the request of the Bratenahl Local School District for postponement of the dissolution of the school district under Revised Code 3311.29, and the February

9, 1970, resolution has been vacated by the Franklin County Common Pleas Court.

3. The Bratenahl Local School District legally exists and is entitled to technical and professional assistance from the defendants under Revised Code Sections 3301.12 and 3301.13.
4. Nothing in the Decision of this Court of August 8, 1973, or in this Judgment Entry shall prevent the State Board of Education from holding a proper Chapter 119 hearing with regard to the issue of whether an exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. There is no genuine issue as to any material fact and the plaintiff is entitled to summary judgment on the issue of whether Revised Code 3311.29 is self-executing, the Franklin County Court of Appeals having held in a decision rendered January 9, 1973, that said statute is not self-executing.
2. The plaintiff is entitled to a Chapter 119 hearing on the question of whether an exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.
3. The Bratenahl Local School District legally exists and is entitled to technical and professional assistance under Revised Code Section 3301.12 and 3301.13 in the absence of an order of the State Board of Education rendered pursuant to a Chapter 119 hearing on the question of whether an

exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.

/s/ FRED J. SHOEMAKER, *Judge*

[39] STATE BOARD OCTOBER 14, 1974, DISSOLUTION ORDER

RESOLUTION AND ORDER ON BRATENAHL LOCAL SCHOOL DISTRICT

WHEREAS the Board of Education of the Bratenahl Local School District, by Resolution passed June 8, 1968, requested the State Board of Education to approve and authorize an exception for the Bratenahl Local School District to the provisions of Section 3311.29, Ohio Revised Code, for a period of two years commencing July 1, 1968, and agreed in said Resolution that, effective July 1, 1970, the Bratenahl Local School District would cease to exist and its territory would be joined with and made a part of the Cleveland City School District; and

WHEREAS the State Board of Education, by Resolution passed June 10, 1968, granted an exception pursuant to the request of the Bratenahl Local School District from the provisions of Section 3311.29, Ohio Revised Code, for a period not to exceed beyond July 1, 1970, and provided in said Resolution that the Bratenahl Local School District would cease to exist effective July 1, 1970, and would be merged with the Cleveland City School District on July 1, 1970; and

WHEREAS the State Board of Education, by Resolution passed February 9, 1970, denied a request of the Board of Education of the Bratenahl Local School District dated January 28, 1970, to approve a proposed high school

program in Bratenahl and to grant an additional fifteen (15) months to the exception previously granted to the provisions of Section 3311.29, Ohio Revised Code; and

WHEREAS the Board of Education of Bratenahl Local School District prevented the implementation of the earlier resolutions of the State Board by appealing the action of the State Board taken on February 9, 1970, to the Common Pleas Court of Franklin County, Ohio, contending, among other things, that the Board of Education of Bratenahl Local School District was not afforded a complete and fair hearing on the merits, and subsequently filed a declaratory judgment action in the Common Pleas Court of Franklin County, Ohio, contending, among other things, that Section 3311.29, Ohio Revised Code, is not self-executing; that the District had not been afforded a complete and fair hearing on the merits; and that the District was still in existence and entitled to technical and professional assistance under Sections 3301.12 and 3301.13, Ohio Revised Code; and

WHEREAS the Court of Appeals of Franklin County, by its decision rendered on April 27, 1971, and January 9, 1973, has held that the action of the State Board on February 9, 1970, had the effect of a determination of the rights, duties, privileges, benefits or legal relationships of the Bratenahl Local School District and was governed by Sections 119.06 to 119.10, Ohio Revised Code; that Section 3311.29, Ohio Revised Code, is not self-executing in its application; and that the Bratenahl Local School District was entitled to a proper Chapter 119 hearing on its request in January, 1970, for a further exception to Section 3311.29, and for authorization to establish a high school; and

WHEREAS the Franklin County Common Pleas Court, upon remand from the Court of Appeals, has held

that the action of the State Board on February 9, 1970, was reached without a proper Chapter 119 hearing and has vacated the Resolution of the State Board entered on that date; that, in accordance with the Court of Appeals decisions, Section 3311.29, Ohio Revised Code, is not self-executing and that the Bratenahl Local School District is entitled to a Chapter 119 hearing on the question of whether an exception should be granted by the State Board of Education under Section 3311.29, Ohio Revised Code, to the Bratenahl Local School District; and that, in the absence of an order of the State Board rendered pursuant to a Chapter 119 hearing, the Bratenahl Local School District legally exists and is entitled to technical and professional assistance under Section 3301.12 and 3301.13, Ohio Revised Code; and

WHEREAS pursuant to the aforesaid decisions, the State Board of Education by resolution passed at its meeting on September 10, 1973, directed the Superintendent of Public Instruction to notify the Board of Education of the Bratenahl Local School District of the State Board of Education's intent to consider issuing an order dissolving the Bratenahl Local School District and joining its territory with the Cleveland City School District and providing for the transfer of the funds, property, and indebtedness of the Bratenahl Local School District to the Cleveland City School District for the following reasons:

1. On July 1, 1968, the Bratenahl Local School District did not maintain within such district public schools consisting of grades one through twelve, inclusive, as required by Section 3311.29, Ohio Revised Code.
2. The Bratenahl Local School District agreed with the State Board of Education that it would cease to exist effective July 1, 1970, and would be merged with the Cleveland City School District on July 1, 1970.

3. There were no conditions of topography, sparsity of population or any other factors which made compliance by the Bratenahl Local School District with its own resolution of June 8, 1968, and the resolution of the State Board of Education of June 10, 1968, granted at the request of the Bratenahl Local School District, impracticable on February 9, 1970, or on July 1, 1970.
4. There are no conditions of topography, sparsity of population or any other factors which make compliance by the Bratenahl Local School District with its own resolution of June 8, 1968, and the resolution of the State Board of Education of June 10, 1968, granted at the request of the Bratenahl Local School District, impracticable today.
5. The refusal of the State Board of Education on February 9, 1970, to approve a proposed high school program in Bratenahl was consistent with the duty of the State Board to further a thorough and efficient system of common schools throughout the State of Ohio and no reasons have yet been presented to the State Board to justify the approval of a high school program in Bratenahl today; and

WHEREAS the Superintendent of Public Instruction was further directed by the State Board of Education on September 10, 1973, to notify the Bratenahl Local School District, Cuyahoga County, of its right to a hearing pursuant to the provisions and requirements of Chapter 119, Ohio Revised Code; and to appoint a referee; establish the date, time and place; and give notice of a hearing on the intent of the State Board of Education, as set forth above, should a hearing be requested, pursuant to the provisions of Chapter 119, Ohio Revised Code; and

WHEREAS the State Board of Education now finds full compliance with its direction enumerated above and that a hearing pursuant to the provisions of Chapter 119,

Ohio Revised Code, was duly held before Referee William A. Carroll on November 15, 19 and 20, 1973 on said matter; and

WHEREAS the State Board of Education now finds that said Referee, on September 16, 1974, submitted to the State Department of Education a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken, which included, *inter alia*, the following:

FINDINGS OF FACT

1. Bratenahl did not on July 1, 1968 maintain a school system consisting of grades 1 through 12.
2. Bratenahl on June 8, 1968 committed itself to merging with the Cleveland City School system as of July 1, 1970.
3. As of July 1, 1970 Bratenahl did not maintain a school system consisting of grades 1 through 12.
4. Since September of 1971 Bratenahl has operated a system consisting of elementary grades in conventional school facilities and grades 9 through 12 in two separately leased facilities (an abandoned Nike site for the school year 1971-72 and in a Jewish temple (Teferith Israel Society) for the school year 1972-1973 and to date). This four-year program was not the subject of charter granted pursuant to Section 3301.16, Revised Code, although such charter has been applied for and the Cuyahoga County Board of Education has approved a course of study as required by Section 3313.60, Revised Code, as of November 7, 1973.
5. That the high school facility operated by Bratenahl as of the hearing did not meet the state minimum standards for high schools, and had it been chartered as of such date, revocation of such charter would have been dictated by operation of Section 3301.16, *supra*.

6. That the educational needs of the pupil population of Bratenahl would be best served by the merger with the Cleveland City School system because such merger would provide a more comprehensive program, better serve special needs and result in a more economical operation.

CONCLUSIONS OF LAW

1. The provisions of Section 3311.29, *supra*, requiring the maintenance of grades 1 through 12 by a school district contemplate a *de jure* rather than a *de facto* maintenance. As a consequence, despite the fact that Bratenahl presently enjoys legal existence as a school district, it is in violation of said section..
2. By reason of the conclusions reached in paragraph (1) above, the dissolution of Bratenahl is dictated by operation of the aforesaid statute.
3. There were no conditions of topography, sparsity of population or other factors as would have rendered the dissolution of Bratenahl and its consequent merger with the Cleveland City School District impracticable as of July 1, 1968, July 1, 1970 or as of the date of the hearing on November 15, 19 or 20, 1973.
4. By reason of the conclusions stated in paragraphs numbered (1) through (3) hereof, and as of any of the dates mentioned in paragraph (3), there was no legal or practical ground for granting Bratenahl an exception for the purpose of operating the high school facility which it now maintains without a charter lawfully issued pursuant to Section 3301.16.
5. That the findings, conclusions and recommendations expressed in this report may be modified or disapproved by the Board pursuant to Section 119.09, Revised Code.

RECOMMENDATION

It is, therefore, recommended that the respondent Bratenahl Local School District be dissolved and merged with the Cleveland City School District by appropriate order of the State Board of Education as provided by Section 3311.29, Ohio Revised Code.

WHEREAS the State Board of Education now finds that said written report of said Referee was duly served upon the Bratenahl Local School District, Cuyahoga County, and objections thereto were filed on behalf of said school district on October 7, 1974; and

WHEREAS the State Board of Education has given serious consideration to said objections, and finds them not to be well taken; and

WHEREAS the State Board of Education finds the Findings of Fact, Conclusions of Law and Recommendation of the Referee to be well taken, especially the finding "That the educational needs of the pupil population of Bratenahl would be best served by a merger with the Cleveland City School system because such merger would provide a more comprehensive program, better serve special needs and result in a more economical operation;" Now Therefore

BE IT RESOLVED That the State Board of Education confirms and approves, and it hereby does, the report and recommendation of the referee; and

BE IT FURTHER RESOLVED That the State Board of Education orders, and it hereby does, that the Bratenahl Local School District, Cuyahoga County, be hereby dissolved and its territory hereby joined with the Cleveland City School District pursuant to the provisions of Section 3311.29, Ohio Revised Code, effective as of November 1, 1974; and

BE IT FURTHER RESOLVED That the State Board of Education orders, and it hereby does, the funds, property, and indebtedness of said Bratenahl Local School District be transferred to the Cleveland City School District effective as of November 1, 1974, the Cleveland City School District being the only contiguious school district to the Bratenahl Local School District and the Cleveland City School District being the only school district to receive the territory of the Bratenahl Local School District; and

BE IT FURTHER RESOLVED That as a result of the confirmation and approval of the report and recommendation of the referee and this order dissolving the Bratenahl Local School District, Cuyahoga County, the request of the Bratenahl Local School District, Cuyahoga County, for a high school charter has become moot; and

BE IT FURTHER RESOLVED That the State Board of Education encourages, and it hereby does, the orderly transition of said jointure with due consideration to any pupils who may be affected thereby, and offers such technical and professional assistance of the State Department of Education as may be requested and helpful in the implementation of this resolution; and

BE IT FURTHER RESOLVED That The Superintendent of Public Instruction be directed, and he hereby is, to serve true copies of this resolution by certified mail on the Bratenahl Local School District, Cuyahoga County; Cuyahoga County Board of Education; Cleveland City School District; and counsel of record in said matter pursuant to the requirements of Chapter 119, Ohio Revised Code.

I certify that the foregoing is a true and exact copy of a Resolution and Order on Bratenahl Local School District duly adopted by the State Board of Education on the fourteenth day of October, 1974.

Oct. 15, 1974
Date

/s/ M. W. Essex
Secretary,
State Board of Education

[42] TWELVE GRADE STATUTE, REVISED, EFFECTIVE SEPTEMBER 30, 1975

§ 3311.29 School district must maintain public school; exceptions.

Except for a joint vocational school district, no school district shall be created and no school district shall exist which does not maintain within such district public schools consisting of grades kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.022 [3317.02.2] to 3317.025 [3317.02.5] of the Revised Code to any school district that does not maintain schools with grades kindergarten through twelve and to which no exception has been granted by the state board of education.

*HISTORY: 135 v H 159 (Eff 9-30-75).

[43] TRIAL COURT DECEMBER 16, 1975 DECISION AFFIRMING OCTOBER 14, 1974, STATE BOARD DISSOLUTION ORDER

Case No. 74CV-10-3903

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION OF OHIO, *et al.*,
Appellees.

DECISION ON APPEAL

Rendered this 16th day of December, 1975.

GILLIE, *J.*

A review of the numerous steps by which the parties have reached their present juxtaposition is unnecessary. Suffice it to say that a Chapter 119 hearing was held on November 15, 19 and 20, 1973, resulting in an order by the State Board of Education of Ohio, dissolving the Bratenahl Local School District.

The appeal from that order poses the question to this Court as to whether or not the order of dissolution of the Bratenahl Local School District is supported by reliable, probative and substantial evidence and is in accordance with law.

The Court has examined the entire record in the case, including the transcript of evidence presented to the Referee of the State Board and finds that there is reliable, probative and substantial evidence upon which the State Board could and did rely in reaching its finding that at no time during the entire period in question had the Bratenahl Board of Education met the standards required of a high School in Ohio.

There remains the question as to whether or not the order is in accordance with law.

Section 3311.29 of the Revised Code of Ohio, in pertinent part states:

> "No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable. "The superintendent of public instruction is without authority to distribute funds under Sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive and to which no exception has been granted by the state board of education."

Much has been said by the Bratenahl Local School District of the failure of the State Board of Education to furnish consultive and advisory assistance to the Bratenahl

District. This argument, while apparently not supported by the facts, is not relevant to the issue.

In the effort to furnish the children of this State with the best possible education, as called for by Section 3301.07(D), the State Board of Education is required by Section 3301.07(B) to provide help to local school systems, but this duty or the State Board's failure to perform it is not an issue here since help by the State Board is not a part of nor prerequisite to the operation of Section 3311.29, Revised Code of Ohio.

The Bratenahl Local School District argues that state standards for a school or school system may not be read into Section 3311.29. This is true, and yet, it is the Court's opinion that if we accept the premise that the State and local boards of education are, by the provisions of Section 3301.07, Revised Code of Ohio, under a mandate to provide quality education, Section 3311.29 R. C. may not be read to allow the operation of a school lacking essential qualifications comprising State standards. The position that a school which does not meet state standards complies with Section 3311.29, Revised Code, is untenable.

The Court therefore finds that the order of the State Board of Education made pursuant to the finding of the Referee in the 119 hearing is in accordance with the law.

The Court hereby affirms the order of the State Board of Education issued October 14, 1974 dissolving the Bratenahl Local School District.

WILLIAM T. GILLIE, *Judge*

[45] COURT OF APPEALS DECEMBER 16, 1976 DECISION REVERSING TRIAL COURT

No. 76AP-67

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
DEPARTMENT OF EDUCATION OF OHIO,
and
MARTIN W. ESSEX, SECRETARY,
STATE BOARD OF EDUCATION OF OHIO,
Appellees-Appellees.

DECISION

Rendered on December 16, 1976

WHITESIDE, *J.*

Appellant, Board of Education, Bratenahl Local School District, hereinafter referred to as "Bratenahl," appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Board of Education, hereinafter referred to as "State Board," ordering dissolution of Bratenahl pursuant to R. C. 3311.29. In support of its appeal, Bratenahl has raised four assignments of error as follows:

> "The Court of Common Pleas, in its December 30, 1975, judgment in this cause:

"1. Erred in denying the Bratenahl Request For the Admission of Additional Evidence (under R. C. 119.12).

"2. Erred in denying the Bratenahl Motion to Invalidate State Board of Education Order As a Matter of Law, pursuant to R. C. 119.07.

"3. Erred in its statutory construction of R. C. 3311.29.

"4. Erred in its separate findings that the October 14, 1974, State Board of Education dissolution order was supported by reliable, probative and substantial evidence and was in accordance with law."

R. C. 3311.29 was amended in 1967 to require that every school district "maintain within such district public schools consisting of grades one through twelve," and that, after July 1, 1968, any district not so maintaining public schools consisting of such grades would be dissolved unless granted an exception by the State Board in accordance with that section. At that time, Bratenahl did not maintain a high school within the district but, instead, paid tuition for students of the district to attend high school in other districts. Prior to July 1, 1968, Bratenahl could not have maintained a high school inasmuch as a minimum of 240 students were required by state standards, more students than Bratenahl had in all twelve grades. By an order of June 10, 1968, the State Board granted Bratenahl a two-year exception from R. C. 3311.29. Subsequent to this order, new minimum standards previously adopted by the State Board became effective on July 1, 1968, eliminating the requirement of a minimum of 240 students so that Bratenahl theoretically after July 1, 1968, and during the period of the extension, could comply with R. C. 3311.29 and maintain grades one through twelve within the district.

When Bratenahl became aware of the new minimum standards sometime after they took effect, Bratenahl commenced efforts to establish a high school within the district. Bratenahl retained Stanton & Leggett & Associates to conduct a feasibility study and to develop plans for a Bratenahl high school. In December, 1969, Bratenahl requested the State Board for a further exception from the application of R. C. 3311.29 in order to establish a high school and made a formal request for such relief in January, 1970. On February 9, 1970, without affording Bratenahl a hearing, the State Board denied Bratenahl's request. Bratenahl, pursuant to R. C. 119.12, appealed this order to the Court of Common Pleas. That court dismissed the appeal upon the grounds that the State Board's order was not a final appealable order. This court upon appeal found the order to constitute a final appealable order and remanded the cause to the Common Pleas Court pursuant to the unreported decision in *Bd. of Education of Bratenahl Local School District v. State Bd. of Education*, No. 9815, Court of Appeals of Franklin County, April 27, 1971 (1971 Decisions, page 694). The Supreme Court on October 5, 1971, denied the State Board's motion to certify.

During the pendency of that appeal in the Court of Common Pleas upon remand from this court, Bratenahl, on November 29, 1971, filed an action for declaratory judgment. The Court of Common Pleas on August 14, 1972, dismissed both the appeal and declaratory judgment actions. By unreported decision in the case of *Bd. of Education of Bratenahl Local School District v. State Bd. of Education*, Nos. 72AP-269 & 72AP-270, Court of Appeals of Franklin County, January 9, 1973 (1973 Decisions, page 34), this court reversed the dismissal of both the appeal and declaratory judgment actions and again remanded to the Court of Common Pleas.

Upon remand of the appeal action, the Court of Common Pleas, by judgment entry entered on August 24, 1973, vacated the February 9, 1970, order of the State Board denying Bratenahl an exception from the operation of R. C. 3311.29 for the purpose of establishing a high school. The Court of Common Pleas did not remand that proceedings to the State Board for further action, nor did the Court of Common Pleas expressly grant the requested relief to Bratenahl, stating that the action of the State Board was taken without a proper R. C. Chapter 119 hearing. A few days later on August 30, 1973, the Court of Common Pleas entered a declaratory judgment expressly finding that Bratenahl is a legally existing school district and is entitled to an R. C. Chapter 119 hearing on the question of whether it is entitled to an exception pursuant to R. C. 3311.29. Although the phraseology of the judgment is not entirely explicit, the effect of that declaratory judgment is that Bratenahl is a legally constituted school district and will continue to be such unless and until a dissolution order be entered pursuant to R. C. 3311.29 or otherwise. Such conclusion is of course predicated in part upon the prior determination by this court that R. C. 3311.-29 is not self-executing but requires action by the State Board for implementation.

Thereafter, the present proceedings were instituted to fulfill the State Board's desire to dissolve Bratenahl pursuant to R. C. 3311.29 by resolution of September 10, 1973, indicating the Board's preliminary determination to dissolve Bratenahl and that Bratenahl is not entitled to an exception pursuant to R. C. 3311.29. Pursuant to request of Bratenahl, an R. C. Chapter 119 hearing was held before a referee on November 15, 19, and 20, 1973. On September 15, 1974, the referee made his report and recommendations to the State Board, making five findings of fact and five conclusions of law, as follows:

"FINDINGS OF FACT

"* * *

"(1) Bratenahl did not on July 1, 1968, maintain a school system consisting of grades 1 through 12.

"(2) Bratenahl on June 8, 1968, committed itself to merging with the Cleveland City School System as of July 1, 1970.

"(3) As of July 1, 1970, Bratenahl did not maintain a school system consisting of grades 1 through 12.

"(4) Since September of 1971 Bratenahl has operated a system consisting of elementary grades in conventional school facilities and grades 9 through 12 in two separately leased facilities (an abandoned Nike site for the school year 1971-1972 and in a Jewish temple (Teferith Israel Society) for the school year 1972-1973 and to date. This four-year program was not the subject of charter granted pursuant to Section 3301.16, Revised Code, although such charter has been applied for and the Cuyahoga County Board of Education has approved a course of study as required by Section 3313.60, Revised Code, as of November 7, 1973.

"(5) That the high school facility operated by Bratenahl as of the hearing did not meet the state minimum standards for high schools, and had it been chartered as of such date, revocation of such charter would have been dictated by operation of Section 3301.16, *supra*.

"(6) That the educational needs of the pupil population of Bratenahl would be best served by a merger with the Cleveland City School System because such merger would provide a more comprehensive program, better serve special needs and result in a more economical operation.

"CONCLUSIONS OF LAW

"(1) The provisions of Section 3311.29, *supra*, requiring the maintenance of grades 1 through 12 by a school district contemplate a *de jure* rather than a *de facto* maintenance. As a consequence, despite the fact that Bratenahl presently enjoys a legal existence as a school district, it is in violation of said section.

"(2) By reason of the conclusions reached in paragraph (1) above, the dissolution of Bratenahl is dictated by operation of the aforesaid statute.

"(3) There were no conditions of topography, sparsity of population or other factors as would have rendered the dissolution of Bratenahl and its consequent merger with the Cleveland City School District impracticable as of July 1, 1968, July 1, 1970, or as of the date of the hearing on November 15, 19, or 20, 1973.

"(4) By reason of the conclusions stated in paragraphs numbered (1) through (3) hereof, and as of any of the dates mentioned in paragraph (3), there was no legal or practical ground for granting Bratenahl an exception for the purpose of operating the high school facility which it now maintains without a charter lawfully issued pursuant to Section 3301.16.

"(5) That the findings, conclusions and recommendations expressed in this report may be modified or disapproved by the Board pursuant to Section 119.09, Revised Code."

Only the first and fourth findings of fact are both pertinent and fully supported by reliable, probative, and substantial evidence. The second purported finding of fact is irrelevant to the issues herein, this court having held to this effect in both the 1971 and 1973 decisions of this court rendered upon the prior appeals involving the status of Bratenahl, which was clearly established by the judgment of the Common Pleas Court in the declaratory

judgment action, declaring that Bratenahl has continued legal existence. Although the third finding of fact is technically correct, it is difficult to conceive of any relevance to the issue before us.

The fifth and sixth findings of fact present special problems in that they are in part supported by reliable, probative, and substantial evidence and in part not so supported. Insofar as the fifth finding of fact finds that the high school facility operated by Bratenahl did not, as of the date of hearing before the referee, meet the totality of the state minimum standards for high schools, there is reliable, probative, and substantial evidence to support such a finding. However, there is no such evidence to support a finding that a charter, had it been issued, would have been required to be revoked by operation of R. C. 3301.16, which in any event is more in the nature of a conclusion of law. As to the sixth finding of fact, there is some evidence to support a finding that merger with the Cleveland school district would provide a more comprehensive program and better serve special needs of high school students, but there is no such evidence with respect to elementary students, nor is there any evidence to support a finding that merger would result in a more economical operation. As to the conclusions of law, only the fifth conclusion of law is fully legally correct; however, it relates only to the power of the State Board to either approve, disapprove, or modify the findings and recommendations of the referee and does not relate to the merit issues.

Notwithstanding these deficiencies in the findings of fact and conclusions of law made by the referee, the State Board adopted such findings of fact and conclusions of law in toto as well as the recommendation of the referee that Bratenahl be dissolved and merged with the Cleve-

land school district pursuant to R. C. 3311.29. It is this order which is the subject of this appeal.

When one travels upon the wrong road, he usually arrives at the wrong destination. Unfortunately, the referee and the State Board traveled upon the wrong road with respect to the third conclusion of law, predicating the conclusion set forth in the fourth conclusion of law that there was no ground for granting Bratenahl an exception upon consideration of whether merger of Bratenahl with the Cleveland city school district was impracticable. R. C. 3311.29, however, predicates exceptions upon whether compliance with R. C. 3311.29 is impracticable; that is, whether it is impracticable for the district, Bratenahl in this case, to maintain public schools consisting of grades one through twelve inclusive. R. C. 3311.29 has since been amended so as to require maintenance of kindergarten through the twelfth grade and presently reads, as follows:

> "Except for a joint vocational school district, no school district shall be created and no school district shall exist which does not maintain within such district public schools consisting of grades kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.
>
> "The superintendent of public instruction is without authority to distribute funds under sections 3317.022 to 3317.025 of the Revised Code to any school district

> that does not maintain schools with grades kindergarten through twelve and to which no exception has been granted by the state board of education." (Note: with the exception of the change from grade one to kindergarten and the addition of the introductory clause "except for a joint vocational school district," this section has read the same at all times pertinent hereto.)

Although this issue has not been explicitly argued by Bratenahl, it is raised by the assignments of error and was specifically raised by Bratenahl before the referee. (Tr-49.) Accordingly, this court will proceed to consider this basic, important issue, which is one of the two fundamental issues upon which this litigation rests; the two issues being: (1) whether Bratenahl is presently in compliance with R. C. 3311.29, which we will discuss *infra;* and (2) if not, whether Bratenahl is entitled to an exception from the operation of R. C. 3311.29; that is, an exception from maintaining grades kindergarten through twelve.

R. C. 3311.29 requires each school district to maintain grades kindergarten through twelve, unless granted an exception by the State Board because "topography, sparsity of population, and other factors make compliance impracticable." Obviously, "compliance" means the maintaining of grades kindergarten through twelve. No issue is raised or presented by R. C. 3311.29 as to whether or not merger is impracticable; rather, the issue is whether compliance with the mandate of R. C. 3311.29 is impracticable, that mandate being the maintenance of grades kindergarten through twelve by each school district.

The topographical features of Bratenahl are somewhat unique in that it is a long strip-like district, being much longer than wide, bounded on one wide side by Lake Erie and on the other by a freeway. However, the topographical features would not in and of themselves make compliance with R. C. 3311.29 impracticable.

However, the evidence is quite overwhelming that there is a sparsity of population problem with respect to Bratenahl and has been at all times pertinent to this case. Population, of course, refers to student population, rather than total population, since it is only student population which is pertinent to the practicability of maintaining grades kindergarten through twelve.

The elementary school enrollment of Bratenahl during the 1968-1969 through the 1973-1974 school years has varied from 167 to 183, and was 174 at the time of the hearing before the referee. (Agency Exhibit 26.) Even a portion of these students were tuition students from another school district, admitted to Bratenahl on a tuition basis for the purpose of implementing an integration program. The high school enrollment was somewhat lower. For the 1972-1973 school year, the total high school enrollment was 72, consisting of 25 in the ninth grade, 14 in the tenth grade, 9 in the eleventh grade, and 25 in the twelfth grade. (Agency Exhibit 12.) For the 1973-1974 school year, at least as of October 5, 1973, the enrollment had dropped to 57 in the Bratenahl high school, consisting of 22 in the ninth grade, 16 in the tenth grade, 10 in the eleventh grade, and 9 in the twelfth grade. (Agency Exhibit 16.) Although other enrollment figures were mentioned from time to time by various witnesses, at the time of the hearing before the referee, the total Bratenahl high school enrollment was clearly less than 60.

Every educator witness who expressed any type of opinion as to the feasibility of Bratenahl conducting a high school expressed the opinion that it would be exceedingly difficult to do so and to meet state standards in view of the very limited high school enrollment in Bratenahl. Almost without exception, these opinions were expressed predicated upon generalities as to small high schools compared to large high schools, rather than specifically upon

the operation of a high school by Bratenahl. Dr. Briggs, Superintendent of the Cleveland Public Schools, testified that, from his experience, it would be most difficult to maintain a high school with such a limited number of students enrolled, but expressly stated that his opinion was expressed without reference to any evaluation of the Bratenahl school. (Tr 74-76.) Perhaps the best summary of the foundation of the opinion expressed by the various educator witnesses to the effect that Bratenahl cannot maintain a high school is set forth by Dr. Bowers in Agency Exhibit 15, as follows:

> "* * * Quite frankly, I must question the propriety of maintaining a high school for either the current or reasonably anticipated enrollment in grades nine through twelve of the Bratenahl Local School District. The salient reasons for this purely personal opinion are as follows:
>
> "1. The limited number of professional staff members with whom students can be expected to have association during their four years in high school.
>
> "2. The inordinate number of separate preparations required of professional staff members to provide the current sub-minimal course offerings.
>
> "3. Although the professional staff may qualify as 'master teachers,' the degree of expertise which they can bring to each of the numerous courses for which they are responsible is necessarily limited.
>
> "4. The limited enrollment necessarily restricts the degree of socialization among students.
>
> "5. The existing high school program is based on inefficient allocations of financial resources, staff and facilities.
>
> "6. Expansion of the existing high school program to achieve the thoroughness required by minimum standards can only compound the current inefficient allocations of resources.

"* * * The financial resources and creative administrative leadership of the Bratenahl Local School District do not offset the sheer limitations imposed by the limited number of students."

From the testimony of the various expert educator witnesses presented by the State Board, only one conclusion is possible: that it is impracticable for Bratenahl to maintain a high school, consisting of grades nine through twelve, because of the limited number of students in such grades within the district. This constitutes a sparsity of population within the contemplation of R. C. 3311.29, making compliance with the requirement of R. C. 3311.29 of maintaining grades kindergarten through twelve impracticable predicated upon the opinion of every State Board witness. In other words, there was overwhelming evidence that compliance by Bratenahl with R. C. 3311.29 is impracticable because of a sparsity of population, that is that it is impracticable for Bratenahl to maintain public schools consisting of grades kindergarten through twelve, inclusive, because of the sparsity of population in grades nine through twelve. Such conclusion is fortified by the statement of the referee during the course of his report that: "Evidence offered on the hearing tended to establish that the high school facility maintained by Bratenahl did not in all respects comply with current minimum standards (Tr. 100-107) notwithstanding what appears to be a valiant effort to do so with a limited pupil population and limited physical facilities." The referee, thus, recognized the two most important factors which might well be said to render impracticable compliance by Bratenahl with R. C. 3311.29; namely, "limited pupil population and limited physical facilities."

Notwithstanding this great difficulty, Bratenahl has engaged in almost herculean efforts to maintain a high

school. It has employed experts to assist it in this regard. In August, 1971, Bratenahl applied to the State Board for a charter for a high school predicated upon a multi-volume program prepared for Bratenahl by the College of Education of the University of Akron. This study program is the foundation upon which the present operation of Bratenahl High School is based. The State Board refused to consider the application for charter until then pending litigation was terminated. Nevertheless, Bratenahl commenced operation of the high school in September, 1971, and has continued operation thereof at two different locations ever since. A site for a high school was acquired by Bratenahl, and the electors of Bratenahl authorized a bond issue for the construction of a high school. However, due to the litigation, Bratenahl has been unable to sell such bonds and commence construction of a high school.

It was not until November 9, 1973, just a few days before the commencement of the hearing before the referee that Bratenahl was given any evaluation of its high school program by the State Board.

At that time, some deficiencies were noted insofar as compliance with the minimum standards established by the State Board for Ohio high schools. There are approximately 272 separate standards which a high school must meet, and the Bratenahl high school meets approximately 90 percent of those standards. (Tr-109.) The overwhelming majority of the deficiencies noted relate to facilities, rather than to the educational qualities.

Many of the deficiencies are quite technical in nature and easily corrected. For example, the State Board found that the band class was not scheduled for the required clock hours since the State Board considered the band class a laboratory class, rather than an academic class, the distinction being whether or not homework is required. Another example is a statement that one teacher is as-

signed subjects for which she does not hold a valid certificate. The evidence indicates, however, that the teacher in question holds a Ph.D in English and teaches journalism and drama as well as English. The State Board apparently will not recognize the certification to teach English to allow such teacher also to teach journalism and drama, although it appears that it is primarily a matter of having the teacher's certificate modified to include those courses which obviously are closely related to English.

Two of the deficiencies noted relate to the course offerings by Bratenahl, one relating to industrial art and the other to the scheduling and operation of 55 units. Of the minimum standards for Ohio high schools (stipulated exhibit 6), standard EDb-403-02(C) provides, as follows:

> "Each high school shall be comprehensive unless classified by the State Department of Education as college preparatory, vocational or island schools and shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 45 units of credit as follows:
>
> | | |
> |---|---|
> | "(1) Art | 1 unit |
> | "(2) Business education | 5 units |
> | "(3) English | 5 units |
> | "(4) Foreign language | 2 units |
> | "(5) Home economics | 3 units |
> | "(6) Industrial arts | 3 units |
> | "(7) Mathematics | 3 units |
> | "(8) Music | 1 unit |
> | "(9) Physical education and health | 1 unit |
> | "(10) Social studies | 3 units |
> | "(11) Science | 3 units |
> | "(12) In addition to above or other subjects | 15 units |

> "(13) Three-year high schools may include units or their equivalent scheduled in the ninth grade of junior high schools within the school system.
>
> "(14) A new tax supported high school organized after July 1, 1968, shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 55 units of credits including the units listed in (1) through (13) above."

It will be noted that, although Bratenahl is required to schedule and operate "in separately organized classes with students enrolled" a minimum of 55 units of credit, other existing high schools, except college preparatory, vocational, or island schools, are required to schedule and operate only 45 units of credit. In other words, Bratenahl, having established its high school after July 1, 1968, is required to maintain 55 units of credit; whereas, all high schools established prior thereto are required to maintain 10 units of credit less. Bratenahl's offerings and schedulings more than meet the lesser standard, but there is evidence that only 52 units of credit were scheduled and operated at the time of the hearing.

However, three additional units in vocational education were scheduled and operated by contract with the Mayfield school district. The State Board personnel were uncertain as to whether units of credit scheduled by contract at a separate vocational school could be considered as compliance with the minimum standards, including the requirement for industrial arts. R. C. 3313.90 expressly provides that a school district may meet the minimum standards for vocational education by contract with another district.

There was evidence that the only other school districts in the state of comparable size to Bratenahl are the so-called "island schools." Such schools are expressly ex-

cepted from the unit requirements set forth above but, instead, are required to comply with standard EDb-403-02(E), which provides, as follows:

> "A school which is classified as college preparatory, vocational or island schools shall schedule each year those units which satisfy the school's stated purposes and objectives and meet minimum requirements for graduation."

The difficulty of scheduling and operating 55 units of credit for only 57 students is quite apparent. The result is that there are approximately 15 units in which only one student is enrolled in Bratenahl. (The evidence is unclear as to whether this includes the one student enrolled in three courses in vocational education at Mayfield.) There was testimony that this was educationally undersirable.

As to facilities, the evidence in many instances was somewhat sketchy as to the degree of noncompliance with minimum standards. Although the minimum enrollment of 240 students was replaced with the so-called qualitative standard of 55 units of credit, this was not carried over to the facility requirements. Rather, if anything, the facility requirements of the minimum standard are geared to an enrollment of at least 300 students. For example, standard EDb-403-08(I) requires that the library center in schools up to 1,000 students must adequately accommodate at least 8 percent of the enrollment, but with not less than 30 student stations which would be 8 percent of 375. Although one of the physical facility deficiencies of Bratenahl was insufficient student stations, the number provided for the less than 60 students was not indicated.

In many respects, Bratenahl far exceeded minimum standards, for example, standard EDb-403-04(K) provides that the pupil-teacher ratio shall not exceed 27-1, whereas the Bratenahl ratio is only 7-1.

However, the evidence is such as to clearly indicate that Bratenahl at the time of the hearing did not *fully* meet the minimum standards for Ohio high schools as established by the State Board. However, the evidence was also quite clear that everyone, except Bratenahl, recognized that it was impracticable for Bratenahl to operate a high school with so few students, even though there was some evidence that, given time, Bratenahl could correct the deficiencies and meet all of the minimum standards.

Moreover, there was no question but that the Bratenahl Elementary School meets State Board's standards. In fact, the evidence was that, even if there be merger, virtually nothing will be changed with respect to Bratenahl Elementary School. (Tr-58 & 68.) There was no evidence that there would be any advantage to the Bratenahl students by the change of the operation of the Bratenahl Elementary School from the Bratenahl School Board to the Cleveland School Board. (Apparently, the seventh and eighth graders would be transported to a very large junior high school in Cleveland, rather than remain at the Bratenahl School.)

From the totality of the record in this case, it is quite clear, as indicated by the foregoing discussion, that, because of sparsity of population and other factors, it is impracticable for Bratenahl to maintain schools consisting of grades kindergarten through twelve since it is impracticable for it to maintain a high school, unless Bratenahl's valiant efforts to maintain a high school can result in meeting minimum standards, thereby overcoming the otherwise impracticability of maintaining a high school.

The obvious import of R. C. 3311.29 is to compel each school district to maintain within its schools grades kindergarten through twelve, inclusive, and is not designed or intended to eliminate school districts merely because of

a small student population. Rather, an exception is allowed because of sparsity of population. R. C. 3311.29 contemplates that, when a school district has made every reasonable effort to comply with the requirement of maintaining grades kindergarten through twelve within its schools, but it is found to be impracticable for it to do so because of sparsity of population, such school district should not be destroyed and eliminated by dissolution and merger with an adjoining district, but, rather, such a school district should be granted an exception allowing it to continue to exist because of the impracticability of its complying with R. C. 3311.29.

In this case, however, Bratenahl is, and has been, making a valiant effort to comply with the requirements of R. C. 3311.29 and by the companion actions is seeking to compel the State Board to consider the success of such valiant efforts. From the foregoing, it is quite clear that Bratenahl is entitled to an exception pursuant to R. C. 3311.29 to enable it to attempt to comply with the requirements thereof, and, if such efforts fail because of the impracticability of compliance because of the very limited enrollment possible, then, of course, Bratenahl would be entitled to further exception because of such impracticability.

The second major issue, and the one stressed by Bratenahl in its argument, is whether or not Bratenahl, at present, is a noncomplying district. Quite clearly, on July 1, 1968, Bratenahl did not maintain grades one through twelve within its district. However, at the time of the hearing before the referee, and today, and at all times since September, 1971, Bratenahl has in fact maintained grades kindergarten through twelve within its school district. This is exactly what R. C. 3311.29 requires. The referee, however, referred to the Bratenahl's maintenance of grades one through twelve as a "de facto," rather than a "de jure" maintenance. After first creating these artificial categories, the referee then was able to conclude in his first conclusion of law that Bratenahl, although legally existing as a school district, is not in compliance with R. C. 3311.29, since, as the referee reasons, the high school being maintained by Bratenahl has only a "de facto," rather than a "de jure" existence. Such finding is contrary to law.

In our January 9, 1973, decision in cases No. 72AP-269 & 72AP-270, involving the former litigation between the parties with respect to the February 9, 1970, order of the State Board, this court set forth two threshold quesions to be resolved with respect to the controversy, which is still ongoing, stating at page 40 that:

> "Furthermore, Bratenahl in fact does exist and is operating as a school district and, at present, maintains schools with grades 1 through 12 inclusive, but without State Board sanction, and even though the exception granted by the State Board has expired. These cases involve, *inter alia*, the determination of the legal effect of such continued existence, as well as a determination of whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains."

The Court of Common Pleas upon remand determined in the declaratory judgment action that the legal effect of the continued existence of Bratenahl is that Bratenahl continues to be a legal school district with full legal existence, or "de jure" existence within the language of the referee. Although, in the appeal case upon remand, the Court of Common Pleas did not expressly determine whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains, the Court of Common

Pleas did vacate the February 9, 1970, order of the State Board but did not remand the proceedings to the State Board. In the declaratory judgment action, there was some reference to the granting of an exception to Bratenahl. There was, however, no resolution and no determination in that case by the Court of Common Pleas on whether or not the establishment of the high school by Bratenahl and the maintenance thereof by it brought it into compliance with R. C. 3311.29 in September, 1971.

However, we conclude that the establishment and maintenance of grades one through twelve within the Bratenahl school district brought it into full compliance with R. C. 3311.29 in September, 1971, and it is in continued compliance therewith. The issue of whether or not the State Board should have granted a further exception to Bratenahl could be determined only in the appeal action from the February 9, 1970, order. If, upon appeal of that order, it was concluded that the February 9, 1970, order was a valid order, obviously, what Bratenahl did thereafter could not resurrect the existence of Bratenahl, nor bring it into compliance with R. C. 3311.29. However, when the February 9, 1970, order was vacated, and no further proceedings thereon were to be held, no longer could the issue as to whether an exception should have been granted on February 9, 1970, be determined, but thereafter only the question *in praesenti* could be considered and determined.

Much of the controversy herein involves the age-old question of "which comes first." In this case, the question is whether the establishment and maintenance of a high school comes first, or whether the granting of a charter by the State Board comes first. However, from the evidence, it is clear that the State Board will not consider granting a charter for a high school until the high school

is in operation, so that the State Board may evaluate the actual operation of the high school. Under the existing law, Bratenahl, as a duly legally existing school district, not only was authorized to establish schools consisting of grades one through twelve within its district, but was mandated to do so by R. C. 3311.29. Therefore, the establishment by Bratenahl in September, 1971, of public schools consisting of grades one through twelve, inclusive, was within the legal authority of Bratenahl and constituted "de jure" maintenance of grades one through twelve by Bratenahl within the language of the referee.

R. C. 3311.29 provides for dissolution of school districts which do not maintain public schools consisting of grades one through twelve inclusive; whereas, R. C. 3301.16 provides for dissolution of school districts which maintain such schools where such schools do not meet the minimum standards set by the State Board. As most clearly indicated by the record, the proceedings herein were not pursuant to R. C. 3301.16, but were pursuant solely to R. C. 3311.29.

Under R. C. 3311.29, there is no issue involved as to whether the public schools consisting of grades one through twelve meet the state minimum standards. Rather, the sole question under that section is whether or not public schools consisting of grades one through twelve are in fact maintained. The question of whether or not public schools consisting of grades one through twelve are maintained in accordance with State Board's standards is to be determined in a proceedings pursuant to R. C. 3301.16. There are important distinctions between the two proceedings not only as to the issues involved but also as to procedure. Most important is the provision of R. C. 3301.-161 for referendum with respect to an order of dissolution entered following an R. C. 3301.16 proceedings.

We repeat that R. C. 3311.29 and 3301.16 establish two distinct and separate proceedings involving distinct and separate issues. In an R. C. 3311.29 proceedings, there are two basic questions: (1) whether the school district maintains public schools consisting of grades one [now kindergarten] through twelve; and (2) if not, whether the school district is entitled to an exception pursuant to R. C. 3311.29. In an R. C. 3301.16 proceedings, the sole issue is whether or not the public schools being maintained by a school district "meet the standards for elementary and high schools as prescribed" by the State Board.

From the extensive record herein, it is quite clear that the State Board and the referee attempted to conduct what would be tantamount to an R. C. 3301.16 proceedings, disclaiming intent to do so, under the guise of an R. C. 3311.29 proceedings. The prejudicial effect of so doing is clearly indicated by the difference in the proceedings involved, the differences in the notices required, and especially the application of R. C. 3301.161. Accordingly, the R. C. 3311.-29 proceedings herein involved cannot be deemed a substitute for an R. C. 3301.16 proceedings, especially in light of the repeated statements and findings by the referee that the proceedings were solely pursuant to R. C. 3311.29.

The error in creating a "de jure" maintenance of grades kindergarten through twelve with respect to R. C. 3311.29 is most clearly exemplified when applied to existing school districts. The so-called "de jure" requirement could be utilized to dissolve any school district in the state (regardless of whether such district in fact maintains grades kindergarten through twelve) by receiving evidence and making a determination that the schools in fact maintained by such school district are not "de jure" maintained because they do not comply in all respects

with State Board minimum standards. Clearly and obviously, R. C. 3311.29 was not designed as a substitute for an R. C. 3301.16 determination as to whether or not the schools maintained by a school district meet the minimum standards established by the State Board. As indicated, we conclude that in an R. C. 3311.29 proceedings, the issue of whether schools maintained by a school district meet State Board minimum standards cannot be determined. The issue in an R. C. 3311.29 proceedings is whether or not the school district maintains within its schools grades kindergarten through twelve or, if not, whether it is entitled to an exception.

The issue of compliance with minimum standards prescribed by the State Board is to be determined by an R. C. 3301.16 proceedings, not an R. C. 3311.29 proceedings.

Turning now to specific consideration of the assignments of error, the first assignment of error is not well taken. By this assignment of error, Bratenahl contends that the Court of Common Pleas erred in denying its request to admit additional evidence. However, the record reflects that the additional evidence sought to be presented did not relate to the two basic issues which we have found to be presented hereby, but, instead, relate to the issue not presented hereby but as to which the referee erroneously admitted voluminous evidence. In fact, most of the evidence in the record relates to the issue of minimum standards which, as we have indicated above, is not presented by this case.

Although both the referee and State Board disclaimed proceeding pursuant to R. C. 3301.16, much of the evidence adduced before the referee would be pertinent only to such a hearing. Although the record clearly indicates that the proceedings hereunder were pursuant only to

R. C. 3311.29, as indicated above, certain of the findings could properly be made only pursuant to an R. C. 3301.16 hearing. Since it is clear that only an R. C. 3311.29 hearing was intended, no proper notice of a hearing pursuant to R. C. 3301.16 was given. Accordingly, to that extent and for that reason, the second assignment of error is well taken.

For the reasons set forth above, the third assignment of error is well taken. As we have set forth above, R. C. 3311.29 was not properly applied either with respect to the granting of exceptions or with respect to the determination of compliance by Bratenahl with said section.

Likewise, the fourth assignment of error is well taken for the reasons set forth above, which we find unnecessary to repeat. The dissolution order was neither supported by reliable, probative, and substantial evidence, nor was it in accordance with law.

For the foregoing reasons, the first assignment of error is overruled, and the second, third, and fourth assignments of error are sustained; and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision, including the entering of an order reversing and vacating the October 14, 1974, order of the State Board for the reasons set forth above.

Judgment reversed and remanded

STRAUSBAUGH, *P. J.*, concurs.

HOLMES, *J.*, dissenting.

After a thorough review of the multitudinous record and transcripts of this matter, I must come to a contrary conclusion from that of my colleagues.

In one of the numerous decisions of this court in this case, dated January 9, 1973, consolidated cases numbered 72AP-269 and 72AP-270 (1973 Decisions, page 34), remanding the matter to the Common Pleas Court, we stated: "The mandate of this court was to pursue further proceedings consistent with the opinion rendered April 27, 1971." After again repeating most of the pertinent portions of the prior decision, this court stated: "That mandate contemplated a determination of the appeal upon its merits. * * * Bratenahl contends that it was not afforded a proper hearing in accordance with R. C. 119.06 to 119.10. * * * If no proper hearing was held so that there is no evidence in the record, then the order would not be so supported and remand for a proper hearing might be required."

The Common Pleas Court of Franklin County did so in turn remand the matter to the State Board of Education for a hearing in accordance with Chapter 119. The judgment entry of the Common Pleas Court referred to this court's prior decision, but yet only referred to a hearing pursuant to R. C. 3311.29.

The resolution of the state school board, attached to the notice for the administrative hearing, set forth the fact of Bratenahl's request dated January 28, 1970, for approval of the proposed high school programs and also its request for a 15-month extension for the exception. Also the resolution noted the state school board's denial of such requests as entered on February 9, 1970. The record would show that the February 9th order was vacated by the Common Pleas Court. However, the requests for recognition of its high school programs, as had been submitted by Bratenahl, were ostensibly what was before the board for its determination, even though the Common Pleas order seemingly had limited the issue to that of a determination of an exception.

Bratenahl, in its response to the notice of the state school board, requested a Chapter 119 hearing, which request was dated October 4, 1973. Such request for hearing indicated what subject matter should be among those upon which evidence should be adduced, as follows:

> "Bratenahl Local School District (Bratenahl) requests a hearing pursuant to R. C. 119.07, with respect to * * *
>
> "2. The failure of the State Board, the Ohio Department of Education, and the Superintendent of Public Instruction (Essex) to act upon Bratenahl's requests for issuance to it of a high school charter under R. C. 3301.16.
>
> "* * *
>
> "In making this request, Bratenahl has noted that * * * (2) the issuance of a high school charter under R. C. 3301.16 pursuant to previous requests therefor by Bratenahl is governed by the provisions of Chapter 119 of the Revised Code."

Even though the record indicates that there were preliminary hearings before the referee, there is no record of any rulings as to the scope of the hearings at such time. At the outset of the administrative hearing, Bratenahl requested that the hearing go forth on the more limited issue of the exception and the factors determinative thereof as set forth in R. C. 3311.29.

The referee, in response to such motion of limitation, stated that the proceeding would go forth as one under R. C. 3319.29, but that the parties would be given a wide latitude in presenting evidence and testimony, subject to possible objections to the nature of such evidence.

As previously stated, the evidence as presented by the state school board went rather in depth as to the inspections as made of the physical facilities of Bratenahl, and the items found by such inspection group to have constituted violations of state minimum standards. Additionally, Bratenahl did introduce evidence by way of its superintendent of schools, upon its current school programs, and counsel for Bratenahl made reference to such programs that might be considered by the referee in relation to the "other factors" as specifically stated in this section relating to the granting of exceptions.

After an evaluation of all the foregoing facts and circumstances that existed at the time of this administrative hearing pursuant to R. C. 3311.29, I must conclude that the recommendations of the referee, and as approved by the board which resulted in the order of the board dissolving Bratenahl Local School District, was supported by reliable, probative and substantial evidence, and was supported by law.

At the outset, although the notice of the Chapter 119 administrative hearing referred only to the issue of the exception as provided for by R. C. 3311.29 and did not specifically state that such was to be a hearing upon application for a high school charter, pursuant to Chapter 3301, the resolution of the state school board which occasioned such notice contained matters which were in reference to state school board standards.

The notice as given to Bratenahl reasonably notified this school district of the nature of the hearings to be conducted. Additionally, the referee, in defining the scope of the hearings, stated that a degree of latitude would be offered Bratenahl as well as to the state school board to present evidence not only on matters of topography and sparsity of population, but "other factors" which might make compliance impracticable.

I feel that not only within this court's prior decision remanding such matter for a formal administrative procedure hearing, and within the state board's resolution of

September 10, 1973, the broader issues of the Bratenahl educational program was a matter for determination at the administrative hearing therefor. It is my view that the referee did in fact permit evidence of the quality of the program, and compliance or noncompliance with state standards, not on the question of whether a charter should be issued, as per R. C. 3301.19, but whether the grades 1 through 12 as being operated at that time by Bratenahl, did in fact meet state standards. In doing so, the referee merely was applying what he believed this court to have previously stated within its decision.

Based upon the evidence presented by both sides as to the scope and quality of the Bratenahl high school program, the referee found that the high school did not meet the state's minimum standards. Thus, the referee concluded that on the issue of whether an exception should be granted pursuant to the dissolution statute, Bratenahl was still in violation of R. C. 3311.29 in that the operation of grades 1 through 12 was not in accordance with the regulations, and therefore was not a *de jure* operation of such classes.

It is my view that Judge Gillie correctly stated what permissibly could have been considered by the referee in this administrative hearing. The judge stated as follows in his decision affirming the order of the state school board:

> "The Bratenahl Local School District argues that state standards for a school or school system may not be read into section 3311.29. This is true, and yet, it is the court's opinion that if we accept the premise that the state and local boards of education are, by the provisions of section 3301.07, Revised Code of Ohio, under a mandate to provide quality education, section 3311.29, Revised Code, may not be read to allow the operation of a school lacking essential qualifications comprising state standards. The position that a school which does not meet state standards complies with section 3311.29, Revised Code, is untenable."

This has been a prolonged, difficult, and sometimes bitter, case, but it is my honest opinion that those who have been legislatively charged with the responsibility of making professional determinations as to the best educational programs for the students, individually as well as collectively, in this state, have reviewed the facts and circumstances of this case, and have entered their professional determinations and orders.

I am unable to state that the trial court erred in deciding that the determinations of these professionals, as such determinations have found their way into the order of the Board of Education of the State of Ohio here are not based upon reliable, probative and substantial evidence; nor can I say that such order is not in accordance with law.

Conversely, I believe that the findings of the referee and the order of the State Board of Education are supported by reliable, probative and substantial evidence, and I believe that such order of the board was in accordance with law.

Therefore, I would overrule all of the assignments of error of the appellant and would affirm the judgment of the Common Pleas Court of Franklin County.

[46] SUPREME COURT OF OHIO APRIL 14, 1977 ORDER GRANTING REVIEW

No. 77-172

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

[47] SUPREME COURT OF OHIO MARCH 22, 1978 DECISION

Nos. 77-171 and 77-172

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE, ex rel. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

v.

STATE BOARD OF EDUCATION, *et al.*,
Appellants.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

v.

STATE BOARD OF EDUCATION, *et al.*,
Appellants.

School districts—To maintain public school—R. C. 3311.29 —Exceptions—Refusal of State Board of Education to grant—Not an "adjudication"—Not reviewable by court.

1. The refusal of the State Board of Education to grant a local school district an additional exception to the requirements of R. C. 3311.29 does not constitute an "adjudication" within the meaning of R. C. 119.01 (D).

2. In the absence of an "adjudication" as defined in R. C. 119.01(D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County lacks jurisdiction under R. C. 119.12 to review actions taken by a state administrative agency. (*Fortner v. Thomas*, 22 Ohio St. 2d 13; *M. J. Kelley Co. v. Cleveland*, 32 Ohio St. 2d 150, approved and followed.)

(Nos. 77-171 and 77-172—Decided March 22, 1978.)

APPEALS from the Court of Appeals for Franklin County.

This cause involves appeals from decisions rendered by the Court of Appeals for Franklin County concerning a dispute between the Board of Education of the Bratenahl Local School District (Bratenahl) and the State Board of Education of Ohio (state board).

The dispute dates back to 1968. At that time, R. C. 3311.29 provided that:

"* * * after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily * * *." The statute further provided that "* * * the state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable * * *."

Because Bratenahl, as an unchartered school district, did not maintain the required number of grades in 1968, it passed a resolution on June 8, 1968, requesting that the state board grant it a two-year exception, whereupon,

effective July 1, 1970, the Bratenahl Local School District would be dissolved and its territory joined with the Cleveland City School District. On June 10, 1968, the state board granted the request, specifically resolving that the district would be dissolved on the date indicated by Bratenahl in its request. No appeal was taken from this resolution.

Although the effective date of dissolution had been agreed upon, Bratenahl, by resolution dated January 28, 1970, requested a further postponement of the dissolution. The request was denied by the state board on February 9, 1970. It is from this action that Bratenahl sought relief in the Court of Common Pleas.

Upon motion of the state board alleging that the February 9, 1970, order was not a final, appealable order under R. C. Chapter 119, the Court of Common Pleas dismissed Bratenahl's administrative appeal. However, the Court of Appeals reversed and remanded the judgment, holding that the order of the state board was reviewable by the lower court. (A motion to certify the record along with a motion for a restraining order to prevent Bratenahl from opening a high school were denied by this court.)

Thereafter, several issues not relevant to the instant cause were litigated in further proceedings before the Court of Common Pleas and the Court of Appeals. The appeals *sub judice* are taken from decisions rendered by the Court of Appeals in December 1976, wherein the court in case No. 76AP-67 again reversed a decision of the Court of Common Pleas affirming an order of dissolution by the state board and in cases Nos. 74AP-458 and 76AP-384 issued a writ of mandamus, ordering, *inter alia*, that the state board determine whether the Bratenahl Local School District should be granted a charter under R. C. 3301.16.

Appeal was taken to this court from the decision of the Court of Appeals rendered in cases Nos. 74AP-458

and 76AP-384 as a matter of right pursuant to Section 2 (B) (2) (a) (i) of Article IV of the Ohio Constitution (case No. 77-172). Case No. 76AP-67 is a companion appeal and comes before this court upon an allowance of a motion to certify the record (case No. 77-171). The causes have been consolidated herein for argument and final determination.

SWEENEY, *J.* The central issue in this cause is whether in the first instance, Bratenahl could appeal the decision of the state board rendered in 1970, wherein the board denied Bratenahl's request for an additional exception.[1] The Court of Appeals has held in effect throughout the lengthy dispute that Bratenahl had the right under R. C. 119.12 to bring an appeal to the Court of Common Pleas challenging the state board's action of refusing to grant the district an additional exception. We disagree.

Before an appeal can successfully be brought to the Court of Common Pleas of Franklin County under the provisions of R. C. Chapter 119, the proceedings of the administrative agency must have been quasi-judicial in nature. Section 4(B), Article IV of the Ohio Constitution; paragraph one of the syllabus in *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13. In employing the term "quasi-judicial," this court held in paragraph two of the syllabus in *M. J. Kelley Co. v. Cleveland* (1972), 32 Ohio St. 2d 150, that:

"Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence."

[1] Irrespective of the fact that this issue was decided by the Court of Appeals in a prior decision in which this court denied certification of the record, this court is not precluded from reviewing the issue. Paragraph two of the syllabus in *Pengelly v. Thomas* (1949), 151 Ohio St. 51.

Under R. C. 3301.13, it is provided that:

"* * * In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards the department of education, and any officer or agency therein, shall be subject to Chapter 119 of the Revised Code."

Thus, this court is confronted with the issue of whether Bratenahl was entitled to notice and a hearing before the state board under the provisions of R. C. Chapter 119 on the matter of whether the Bratenahl Local School District was entitled to an additional exception under the provisions of R. C. 3311.29 in 1970.

R. C. 119.06 requires that "[n]o adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with section 119.01 to 119.13, inclusive * * *." "Adjudication" is defined under R. C. 119.01 (D) as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person,[2] but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature."

In construing the above statutory provisions together, it is evident that before an order based on an "adjudication"' may be issued by the state board, the board must first provide notice and a hearing. Alternatively, if the order is not based on an "adjudication," it is immaterial that the state board does not furnish parties an opportunity to be heard, since the order, so long as it is authorized by law, is still valid.

[2] The term "person," defined under R. C. 119.01 (F), includes a "person, firm, corporation, association, or partnership." The court does not reach the issue of whether a local board of education is a "person" within the meaning of this section. See *State, ex rel. Osborn v. Jackson* (1976), 46 Ohio St. 2d 41, 46-50.

In the instant cause, the state board did not provide Bratenahl with notice and an opportunity to be heard before refusing to grant the Bratenahl Local School District an additional exception from the requirements of R. C. 3311.29. However, as this court noted in construing language found in R. C. 2506.01 (the counterpart to the judicial review provisions of R. C. Chapter 119 for administrative units of the various political subdivisions in this state) similar to that found in R. C. 119.01(D), "* * * a refusal to act does not determine any rights, duties, privileges, benefits, or legal relationships * * *" of a complaining party. *State, ex rel. Benton's Village Service, v. Usher* (1973), 34 Ohio St. 2d 59, 61. Absent such a determination, there cannot be an "adjudication." Clearly the act of refusing to change one's position is not equivalent to the act of deciding in the first instance which position to take among several alternatives. The "rights," "privileges," and "benefits" of the Bratenahl Local School District to remain in existence after July 1, 1968, were determined by the state board in its resolution dated June 10, 1968, and were not in some way resurrected or placed back into issue upon the subsequent request of appellee in 1970 for an additional exception.

Because the refusal to grant the Bratenahl Local School District an additional exception under R. C. 3311.29 was not an "adjudication" within the meaning of R. C. 119.01(D), the state board's action was valid, despite the fact there was no notice or opportunity to be heard afforded Bratenahl. Absent the rights to notice and a hearing, the refusal of the state board to postpone the predetermined date of dissolution of the Bratenahl Local Schools was not quasi-judicial in nature. *Kelley, supra;* see, also, *Haught v. Dayton* (1973), 34 Ohio St. 2d 32, 35. Consequently, there was no right of appeal under R. C.

119.12 *(Fortner, supra)* and the Court of Common Pleas correctly dismissed Bratenahl's cause of action. This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board.

Because the judgments of the Court of Appeals in cases Nos. 77-171 and 77-172 are based on that court's initial erroneous determination that the state board's 1970 refusal was a reviewable order, they are necessarily reversed.

Judgment reversed in case No. 77-171.
Judgment reversed in case No. 77-172.

O'NEILL, C. J., HERBERT and W. BROWN, JJ., concur.
CELEBREZZE, P. BROWN and LOCHER, JJ., dissent.

CELEBREZZE and LOCHER, JJ., dissenting. We must respectfully dissent from the majority opinion in view of its egregious result and the tenuous legal reasoning advanced as necessitating said result. The record portrays a conflict of over nine years, during which time Bratenahl has striven to maintain its local school district against a steadfast state board's repeated attempts to dissolve and merge the district with a large neighboring district.

Over this period of time the residents of Bratenahl have aptly manifested their genuine concern for the preservation of their local district. Bratenahl, confronted by noncompliance with R. C. 3311.29 (which requires that no school district shall exist after July 1, 1968, which does not maintain public schools consisting of grades 1 through 12), sought an exception, on June 8, 1968, from compliance as provided for in that statute. The state board found a two-year extension to be desirable in view of the overcrowded conditions of neighboring Cleveland school district facilities. It should be noted that, prior to July 1, 1968, a Department of Education regulation required a

minimum of 240 students for the establishment of a new high school. Thus, Bratenahl was foreclosed from attempting to comply with the legislative mandate of R. C. 3311.29 at the time it requested the two-year exception. Thereafter, the 240 student standard was replaced with the requirement of offering 55 units of credit and thus theoretically Bratenahl could operate a high school after July 1, 1968.

Upon ascertainment of the change in the standard, Bratenahl commenced efforts to establish a high school. Stanton Leggett & Associates was retained to conduct a feasibility study and develop plans for a high school. Apparently, the study indicated a 15-month period would be necessary for establishment of a viable high school program. Bratenahl therefore requested the state board to grant a further exception from the effect of R. C. 3311.29.

On February 9, 1970, without having afforded Bratenahl notice or a hearing, the state board, through formal order, summarily denied Bratenahl's request. After lengthy adjudication, the Court of Common Pleas of Franklin County entered a judgment, on August 24, 1973, vacating the order of the state board denying Bratenahl's request for an extended exception. In addition, on August 30, 1973, the Court of Common Pleas entered a declaratory judgment expressly finding Bratenahl to be a legally existing school district and entitled to an R. C. Chapter 119 hearing on its request for an extended exception.

During this tumultuous period, Bratenahl obtained a stay of execution from the state board's denial order and then proceeded to turn a theoretical possibility into a reality. Upon the refusal by the Ohio Department of Education to render technical and professional assistance, Bratenahl engaged the assistance of the School of Education of the University of Akron. In this manner Bratenahl

developed it own high school educational program. Hiring the necessary instructors and administrators, Bratenahl opened its high school in September of 1971, temporarily utilizing an abandoned Nike missile base for its physical facilities. During a lull in this litigious marathon, Bratenahl residents voted approval of a bond issue and additional operating funds, and since September 1975 a newly constructed, specially designed, centrally located high school has been operational within the local school district.

On November 15, 1973, an R. C. Chapter 119 hearing was finally convened, and, pursuant to the referee's findings, which were accepted *in toto*, the state board, on October 15, 1974, issued an order dissolving the Bratenahl local school district. As specific reasons for this order, the board found Bratenahl was not in compliance with R. C. 3311.29 on July 1, 1968 (the effective date in the statute), on February 9, 1970 (the date the request for an extended exception was denied), and on July 1, 1970 (the date the original exception expired).

In our opinion, Bratenahl's admitted noncompliance on the three preceding dates is immaterial to the resolution of the case *sub judice* in light of the Court of Common Pleas' decision, on August 30, 1973, holding that Bratenahl was a legally existing school district. The state board did not prosecute an appeal from this decision.

Inexplicably, the state board held further that Bratenahl was not in *de jure* compliance with the statute on October 15, 1974 (the date of the order of dissolution). However, it is undisputed by the parties that Bratenahl, since September of 1971, has operated a school system consisting of grades 1 through 12. Because this is the only issue involved in the determination of compliance with R. C. 3311.29, we find that the state board's actions on October 15, 1974, had been rendered moot by the course of preceding events.

It is clear that, as a legally existing local school district, Bratenahl's request for a state charter is entitled to consideration by the state board. Accordingly, the decision of the Court of Appeals allowing Bratenahl's complaint for a writ of mandamus should also be affirmed by this court, and the state board should be directed to determine if the local school district presently meets minimum state standards.

Bratenahl's desire for autonomy is not of recent vintage, but is evident from the genesis of the city. In the late 1890's, Bratenahl, then a part of the city of Glenville, opted not to acquiesce in Glenville's decision to join the city of Cleveland. Concomitant with their formation as an autonomous local government, the residents of Bratenahl established their own independent school system, which they have maintained until this day.

The majority's opinion countenances a bureaucratic destruction of nearly a century of local control against the expressed desires of those affected by the conditions of Bratenahl's schools, *i. e.*, the local school district's residents. This approbation is premised upon a legalistic legerdemain that permits the state board to ignore Bratenahl's compliance at the time of the hearing and to dissolve a viable local school district because of a temporary period of noncompliance in the past.

It is common knowledge that Ohio schools are currently in a condition of severe economic plight. We can perceive no logic in the dissolution of a complying local school district, whose residents have willingly provided financial support for their schools. This pernicious action on the part of the state board may well have the effect of replacing the enthusiasm and interest Bratenahl residents have shown in their schools with a general mood of disillusionment, cynicism and apathy.

For the foregoing reasons we would affirm the decisions of the Court of Appeals. We, therefore, respectfully dissent.

[48] BRATENAHL MOTION FOR REHEARING

(Filed March 31, 1978)

Nos. 77-171 and 77-172

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
of Franklin County, Ohio

Case No. 76AP67

Appeal from original actions in the
Court of Appeals of Franklin County, Ohio
Consolidated Cases Nos. 74AP458 and 76AP384

Case No. 77-171

THE STATE, EX REL. BOARD OF EDUCATION
OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee-Movant,

v.

STATE BOARD OF EDUCATION *et al.*,
Appellants-Respondents.

Case No. 77-172

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellee-Movant,

v.

STATE BOARD OF EDUCATION *et al.*,
Appellants-Respondents.

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MOTION OF BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT, FOR REHEARING

The Board of Education, Bratenahl Local School District, moves for rehearing of this Court's decision of March 22, 1978, for the reasons following:

1. *This Court, under misapprehension, has decided a case not before it.* This Court did *not** decide the cases which were appealed to it; this Court *instead decided a case not brought here* on these appeals.

The Court was informed, but only as an item of history, of the earlier State Board order which this Court reviewed. However, the proceedings in that case were *not* included in the record before this Court; that ruling was *not* tendered here for review, and was *not* argued by the parties.

In short—and respectfully—the order this Court has reviewed, and on the basis of which this Court decided these appeals, had nothing to do with the cases appealed to this Court. (Case Nos. 77-171 and 77-172)

This Court mistakenly supposed:

> "*The central issue* in this cause is whether, in the first instance, Bratenahl could appeal the decision of the state board *rendered in 1970*, . . ." (53 Ohio St.2d at 175,)

and, a few lines later reiterated:

> "Thus, this court is confronted with the issue of whether Bratenahl was entitled to notice and a hearing * * * *in 1970*." (53 Ohio St.2d at 176.)

That is the issue this Court decided.

But that issue was *not* before this Court—most respectfully, but also most emphatically, it was *not*.

And it could not have been.

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*Emphasis supplied throughout.

In the welter of actions that have marked Bratenahl's efforts, for over eight years to preserve its public school system against the onslaughts of the State Board of Education, it is easy to see how the Court could fall into the misapprehension that what was before it was merely the last stage of a lawsuit begun in 1970, with respect to the February 9, 1970, State Board denial order and with respect to the first administrative appeal which emanated therefrom.

That, however, is *not* the case.

What was before this Court was not that first administrative appeal. Instead, after the litigation in the first administrative appeal terminated, the September 11, 1973 statutory notice of the State Board *initiated a new proceeding*. It was the new proceeding—*not the old one stemming from 1970*—that is before this Court in the present appeals.

The interval between the first administrative appeal and its termination, on the one hand, and the second court proceedings, on the other, was marked by an August 30, 1973 judgment entered by the Common Pleas Court, and was followed by a period of no litigation, in court, until more than a year later, in October, 1974, when Bratenahl filed its Notice of Appeal in this, its second administrative appeal. That August 30, 1973 judgment was entered, not in the first administrative appeal, but in a separate declaratory judgment action filed by Bratenahl in which the Common Pleas Court, in a final judgment not appealed by anyone, declared:

> "The Bratenahl Local School District legally exists and is entitled to technical and professional assistance from the defendants under Revised Code Sections 3301.12 and 3301.13." (Bratenahl Appendix, p. 12 and 13.)

In that interval, and in reliance upon this declaratory judgment, the Bratenahl School District approved, issued and sold bonds to build its new, and separate, high school that now completes the Bratenahl school system consisting of kindergarten, elementary, and high school grades—i.e., all grades through 12 as required by R. C. 3311.29.

The initial step in the *new proceeding* was taken by the State Board on September 10, 1973. On that date, the State Board adopted a resolution anticipating the dissolution of the Bratenahl District (State Board Appendix, p. 114) and on the next day the State Board issued a notice of hearing (State Board Appendix, p. 112) relating solely to R. C. 3311.29—the statute that, after July 1, 1968, required all school districts to maintain "grades one through twelve * * *." This new act of the State Board led to Chapter 119 hearings on November 15, 19 and 20, 1973 (State Board Appendix, p. 70) and led, ultimately, to the order of the State Board *issued October 14, 1974* dissolving the Bratenahl School District. (State Board Appendix, p. 64.)

It is the State Board order *of 1974* (and *not* the State Board order of 1970) that was the subject of the second administrative appeal. It is that order that came before this Court on the present appeals, along with the two mandamus actions brought by Bratenahl.

The consequence of this Court's decision, dealing with the 1970 order that was not before it, is that (1) the 1974 State Board dissolution order, (2) the Court of Appeals judgments reversing same in the second administrative appeal, and (3) the two mandamus actions, remain untouched, unconsidered and undetermined by this Court.

There is, of course, no room, or even intent, to quarrel with this Court's decision ((on the authority of *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, 257 N.E.2d 171, and

M. J. Kelley Co. v. Cleveland (1972), 32 Ohio St. 2d 150, 290 N.E. 2d 562, cited by this Court) that the 1970 order this Court reviewed can be considered administrative only, nd not quasi judicial, and therefore not subject to appeal.

Nor is there reason, or intent, to quarrel with this Court's holding that in a subsequent appeal in the same case this Court (on the authority of *Pengelly v. Thomas* (1949), 151 Ohio St. 51, 84 N.E.2d 265) is not bound under the doctrine of "law of the case" by the decision of a Court of Appeals in a prior appeal in the same case which this Court had refused to review.

The difficulty with those cases, relied upon by the Court—most respectfully—is that they *have nothing to do with the appeals that were before this Court.*

The blunt fact is that the result in the first administrative appeal is irrelevant to the present appeals.

This was recognized by the State Board, for it assured this Court that, although the history of the controversy dates back to 1968:

> "the origin of this appeal *is the October 14, 1974, unanimous resolution and order* of the State Board which ordered the dissolution of the Bratenahl Local School District under Revised Code 3311.29 following a very extensive hearing * * *." (State Board Brief on the Merits in this Court, p. 2)

The Court of Appeals also recognized that it had before it, not the 1970 State Board order which was the subject of the first administrative appeal, but that:

> "*a new proceeding was initiated* by the State Board itself in an effort to dissolve Bratenahl pursuant to R. C. 3311.29 [i.e., the statute requiring 12 grades]. Accordingly, the present proceedings were initiated in 1973 and must be determined upon the status in 1973, *not* 1970. (State Board Appendix, p. 8.)

This Court surely should order rehearing.

Otherwise, the issues brought here by the parties in the second administrative appeal and in the two mandamus actions, will go unconsidered and unresolved.

This leads to a second important reason for ordering rehearing, namely:

2. *The property of the Bratenahl School District is taken without the due process of law guaranteed by both the Ohio and the Federal Constitutions* if the Ohio Statutes are construed to allow the taking of that property, and passing it on to the Cleveland Board of Education, by fiat of the State Board, an administrative agency, without review in any court.

That is the inescapable, surprising, and surely unintended, result of this Court's decision.

This is necessarily so because this Court has decided these cases *on the ground there was no right to a review of the 1970 order,* which was involved only in the first administrative proceeding. On that ground the State Board's order dissolving the Bratenahl School District, and passing its property to the Cleveland School District, is now ordered, and enforced, by this Court's decision.

The State Board, if its October 14, 1974 order stands, has stripped Bratenahl of its property in outright denial of the due process of law both the Ohio and the Federal Constitutions say may be denied to no one.

Such a result could not have been intended by this Court; this result could have come about only through misapprehension. This, the Court, upon rehearing, can correct.

The judgment of this Court is subject to a further fatal flaw. This would be true, as next will be pointed out, *even if* the original 1970 State Board order, and the judgment of the Courts thereon, were deemed to be, as this

Court mistakenly supposed, the initial stage of the very same proceeding which is now here. This is so, because:

3. *Dissolution of the Bratenahl School District, in 1974, may not lawfully be determined on the basis of conditions as they were in 1970.* By the time of the 1974 State Board determination, the Bratenahl School System had for three years, ever since September, 1971, met the requirements of R. C. 3311.29 (concerning 12 grades). Despite this, the State Board ordered dissolution of the school system and divestiture of its property on the ground specified by the State Board that Bratenahl "is in violation of" R. C. 3311.29. (State Board Appendix, p. 64-69.)

This was clearly wrong for two reasons:

1. *Conditions had changed since 1970.* When the State Board issued its 1974 order Bratenahl was in compliance with R. C. 3311.29—which stated no requirement except that the district maintain "grades one through twelve * * *."
2. *The law also had changed.* Whereas formerly the standard promulgated by the State Board required a minimum of 240 high school pupils for the establishment of a new high school, the State Board had substituted for this standard a new provision that a new high school could be created, after July 1, 1968, as was the Bratenahl high school, if it provided 55 units of credit. (Previously organized high schools were required to provide only 45 units of credit.) The 240 pupil requirement Bratenahl could not meet. However, when Bratenahl learned of the administrative change made by the State Board in the standard (to allow the establishment of a high school provided it should offer 55 units of credit), Bratenahl undertook to meet that standard. *By September 1, 1971,* Bratenahl had established a system that maintained the 12 required grades, and *by September 1, 1975,* Bratenahl had built and occupied its new building.

In light of the changed situation, this Court could not properly uphold the 1974 order on the ground:

> "*The central issue* in this cause is whether, in the first instance, Bratenahl could appeal the decision of the state board *rendered in 1970* * * *." (53 Ohio St.2d at 175)

To the contrary, these appeals can properly be disposed of, not under the law and conditions obtaining prior to 1970, but only in light of the subsequently changed circumstances.

This Court has so held, as have others.

The governing principle is established by *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, Syllabus 2, 256 N.E.2d 198. The question was whether the Cleveland Trust, in the election of directors, could lawfully vote Cleveland Trust stock held in trusts of which it was the Trustee. There, "After the decision of the Common Pleas Court [holding such shares could not be voted] and almost a year before the decision of the Court of Appeals, substantial changes in the laws of Ohio applicable to banks and trust companies became effective * * *." (21 Ohio St. 2d at 131.)

This Court held that case to be *governed by the subsequent changes.*

The rule this Court applied in *Cleveland Trust* had its genesis in the decision of Mr. Justice Marshall in *United States v. Schooner Peggy* (1801), 1 Cranch 103, that:

> "the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful, when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." (1 Cranch at 110.)

The development of the rule is traced by Mr. Justice Blackmun in *Bradley v. School Board of the City of Rich-*

mond (1974), 416 U.S. 696, particularly at pages 712-715. Although it most frequently is a new provision or a change in statutory law which courts correctly order must be currently applied, the Supreme Court of the United States made clear in *Thorpe v. Housing Authority of the City of Durham* (1969), 393 U.S. 268, that the rule:

> "applies with equal force where the change is made by an administrative agency * * *." (393 U.S. at 282.)

Here, as in *Bradley*, the rule applies with particular force because:

> "the parties consist, on the one hand, of the School Board, a publicly funded governmental entity, and, on the other, a class of children whose constitutional right to a nondiscriminatory education has been advanced by this litigation." (416 U.S. at 718.)

The same principle appears in *Hodges v. Snyder, et al.*, (1923), 261 U.S. 600. In that case a taxpayer brought an action to enjoin the maintenance of an illegal school district and the issuance of bonds in support of that district. It was urged that the school district was invalidly consolidated through the merger of several smaller districts. During the pendency of the suit, and after an initial determination that the district was illegal, the legislature of South Dakota passed a curative act validating the proceedings relating to the organization of the district. The Court held the case *governed by the change*. There, as here, the suit was brought:

> "for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced * * *." (261 U.S. at 603.)

The point is that in litigation involving public rights (as distinguished from purely private judgments) a court

is bound *to give effect to changed circumstances* whether that change be effected by statute, by administrative regulation, or by passage of time working a change in the situation. *It is the public right, as here, that the rule exists to vindicate.*

The Court should, therefore, re-examine the decision in the light of circumstances, previously unknown to Bratenahl, including the change in state standards as to the creation of new high schools.

As above indicated, there were significant changes which occurred *after* the issuance of the 1970 State Board order and *before* the initiation of the present appeal in 1973. It is by these later changes that this Court should be guided, and not the circumstances obtaining when the 1970 State Board order was issued, in the wholly separate first administrative appeal.

Additionally, a further ground calls for rehearing:

4. *Public policy requires rejection of the order of the State Board.* Recall that since September, 1971, Bratenahl has been in compliance with R. C. 3311.29, requiring 12 grades; that since September, 1975, Bratenahl has occupied its newly built high school specifically designed for it and paid for by taxes the residents of Bratenahl have imposed upon themselves.

Bratenahl believes it is in full compliance with every requirement of Ohio law. In any event, the Court of Appeals, in the separate mandamus actions, has ordered that the State Board *determine by appropriate proceedings under R. C. 3301.16 whether Bratenahl is in compliance*, this, in accordance with the State Board's statutory duty, to assist Bratenahl to meet all conditions for accreditation.

The State Board's assertions that it is interested only in a superior education for Bratenahl pupils have a particularly hollow ring in view of the Board's order to dis-

solve the Bratenahl schools and send its pupils to the Cleveland schools—of which the newspapers daily record doubts as to how long these schools will remain open.

The State Board's pious and unctious platitudes about a need to protect Bratenahl pupils from the "substandard" high school Bratenahl operates, are disposed of by this measured and solemn assessment of the situation by the Court of Appeals:

> "At all times since September, 1971, Bratenahl has been in compliance with R. C. 3311.29. The State Board attempted to dissolve Bratenahl for noncompliance with State Board standards but without conducting a hearing pursuant to R. C. 3301.16, which is the procedure necessary to determine dissolution of a district because of noncompliance with minimum standards established for high schools." (State Board Appendix, p. 11.)

Similarly deflated are the State Board's strident charges about deficiencies in the Bratenahl system. The Court of Appeals observed:

> "There are approximately 272 separate standards which a high school must meet, and the Bratenahl high school [as of the Chapter 119 hearing, in November 1973, has shown that it] meets approximately 90 percent of those standards." (State Board Appendix, p. 31.)

Moreover, found the Court of Appeals, "The overwhelming majority of the deficiencies noted *relate to facilities* [obviously cured since the school moved into its new building in September, 1975], rather than to the educational qualities." (State Board Appendix, p. 31.)

The character of the deficiencies the State Board pretends make Bratenahl "substandard" are thus described by the Court of Appeals:

> "Many of the deficiencies [noted as of November 1973] are quite technical in nature and easily corrected. For example, the State Board found that the band class was not scheduled for the required clock hours since the State Board considered the band class a laboratory class, rather than an academic class, the distinction being whether or not homework is required." (State Board Appendix, p. 31.)

Another example: a teacher "is assigned subjects for which she does not hold a valid certificate." (State Board Appendix, p. 31.) The validity of this objection may be judged by the comment of the Court of Appeals that:

> "The teacher in question holds a Ph.D. in English and teaches journalism and drama as well as English. The State Board apparently will not recognize the certification to teach English to allow such teacher also to teach journalism and drama, although it appears that it is primarily a matter of having the teacher's certificate modified to include those courses which obviously are closely related to English." (State Board Appendix, p. 31.)

The lengths to which the State Board is willing to go to crush resistance to its efforts to destroy the Bratenahl District is illustrated by the circumstance that two of the deficiencies noted "relate to the course offerings by Bratenahl, one relating to industrial art and the other to the scheduling and operation of 55 units." (State Board Appendix, p. 31.) As to this, the Court of Appeals observed:

> "Although Bratenahl is required to schedule and operate 'in separately organized classes with students enrolled' a minimum of 55 units of credit, other existing high schools, except college preparatory, vocational, or island schools, are required to schedule and operate only 45 units of credit. In other words, Bratenahl, having established its high school after July 1, 1968, is required to maintain 55 units of credit; whereas, all high schools established prior thereto are required to maintain 10 units of credit less. Bratenahl's offerings and schedulings more than meet the lesser

standard, but there is evidence that only 52 units of credit were scheduled and operated at the time of the hearing.

However, three additional units in vocational education were scheduled and operated by contract with the Mayfield school district. The State Board personnel were uncertain as to whether units of credit scheduled by contract at a separate vocational school could be considered as compliance with the minimum standards, including the requirement for industrial arts. R. C. 3313.90 expressly provides that a school district *may meet the minimum standards for vocational education by contract with another district*" (State Board Appendix, pp. 32-33.)

The State Board, as ordered by the Court of Appeals in the *mandamus* actions, clearly should be required:

> "to comply with R. C. 3301.07, 3301.12(A), and 3301.16 with respect to the Bratenahl High School, including, but not limited to, the duty to determine whether or not such high school should be granted a charter." (State Board Appendix, p. 16.)

CONCLUSION

As is pointed out in *Rehearing In American Appellate Courts* (1960), 25 Federal Rules Decisions, 143, 144 "a court which is final must also be careful * * *." That is the reason every Appellate Court in every state, except Maine, provides by rule for rehearing. The reason is that a court:

> "must admit of the possibility that error may occur and that original decisions may not always be the best possible decisions." (25 Federal Rules Decisions at 144.)

More than one, after mature thought, has changed from a position earlier taken. One of the most felicitous

examples appears in Mr. Justice Jackson's concurring opinion in *McGrath v. Kristensen* (1950), 340 U.S. 162, where the Justice found himself ruling, as a judge, contrary to views he had expressed as Attorney General. For aid, the Justice called upon:

> "Chief Justice Taney, *License Cases*, 5 How. 504, recanting views he had pressed upon the Court, as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' *Andrews v. Styrap*, 26 L. T. R. (N. S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no ground for its being adopted by this Court * * *.' *United States v. Gooding*, 12 Wheat. 460, 478. Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—'Ignorance, sir, ignorance.' But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: 'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.' If there are other ways of gracefully and goodnaturedly surrendering former views to a better considered position, I invoke them all." 340 U.S. at 177.

Judge Harold R. Medina expressed his view of applications for rehearing in this fashion: "the only thing to do is to study them with care in every instance and grant the rehearing or correct the original opinion, if something has been overlooked or some mistake has been made." *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASHINGTON UNIVERSITY LAW QUARTERLY 148, 152.

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[49] STATE BOARD MEMORANDUM CONTRA REHEARING

Nos. 77-171 and 77-172

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
of Franklin County, Ohio

Case No. 76AP67

Appeal from original actions in the
Court of Appeals of Franklin County, Ohio

Consolidated Cases Nos. 74AP458 and 76AP384

Case No. 77-171

THE STATE, ex rel. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee-Movant,

v.

STATE BOARD OF EDUCATION *et al.*,
Appellants-Respondents.

Case No. 77-172

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee-Movant,

v.

STATE BOARD OF EDUCATION *et al.*,
Appellants-Respondents.

MEMORANDUM OF APPELLANTS CONTRA MOTION OF APPELLEE FOR REHEARING

The decision of this Court rendered on March 22, 1978, was based upon undisputed facts in the record, upon the right of this Court to review an important legal issue raised in a prior appeal involving the dispute between these parties, although a motion to certify the record in that earlier appeal had been overruled, and upon the well established law of this state dealing with the issue of when a position taken by an administrative agency is appealable under Revised Code Chapter 119. This Court's decision, totally objective in its analysis and conclusion and reached after a long period of careful deliberation by the Court, marked the end—and properly so—of a dispute between the Board of Education of the Bratenahl Local School District and the State Board of Education, a dispute which, as the Court observed, had its origin in 1968. The majority opinion is factually correct, legally unassailable, and no reason exists for the Court to rehear or reconsider that decision or to further prolong the long dispute between the parties over the dissolution of the Bratenahl Local School District. Certainly none of the four arguments advanced by Bratenahl in its motion for rehearing would justify such an extraordinary action by the Court.

Bratenahl's first contention is that the Court "under misapprehension" decided a case not before it, contending that the August 30, 1973, judgment of the Common Pleas Court should be considered as the end of one case and the September 10, 1973, resolution of the State Board should be considered as the beginning of a separate case (Bratenahl motion, pp. 1-6). Such a contention ignores the nature of the dispute between these parties as well as the realities of the record.

The dispute between the Bratenahl Board of Education and the State Board of Education, from the very beginning in 1968, has concerned one single ultimate issue, *i.e.*, the validity of State Board action dissolving the Bratenahl Local School District. The undisputed facts, disclosed by the record and not challenged in any way by Bratenahl, show that the State Board, by its resolution of June 10, 1968, granted Bratenahl, at Bratenahl's own request, a two year delay in the dissolution mandated by Revised Code 3311.29 and ordered, with Bratenahl's own agreement, the dissolution of the local district effective July 1, 1970. It was the refusal by the State Board to grant Bratenahl any further delay beyond July 1, 1970, which started the dispute, and every proceeding between these parties since that time had its origin in the State Board's refusal on February 9, 1970, to grant any additional exception. The erroneous decision of the Court of Appeals that the mere refusal by the State Board to grant more of a delay constituted an appealable order under Revised Code Chapter 119, required the Common Pleas Court, upon remand, to then find that no Chapter 119 hearing had been held. The Common Pleas Court, however, in its judgment entry of August 30, 1973, specifically provided that Bratenahl (in accordance with the erroneous decision of the Court of Appeals), was entitled to a Chapter 119 hearing on the question of whether a further exception should be granted to Bratenahl and that the State Board could hold a proper Chapter 119 hearing for this purpose (R. 132-133). The State Board promptly, by its resolution of September 10, 1973, then provided the Chapter 119 hearing which the Court of Appeals had erroneously held must be given to Bratenahl before any legal order of dissolution could be made by the State Board. That resolution gave Bratenahl the type of hearing which the Court of Appeals had incorrectly concluded should have been given under Ohio law in February, 1970.

While it is true, of course, that the continuing dispute again reached the Supreme Court of Ohio by virtue of Bratenahl's appeal from the results of the Chapter 119 hearing, it is obviously *not* true, as Bratenahl now claims, that the result in the first administrative appeal is "irrelevant" (Bratenahl motion for rehearing, p. 5). It was, indeed, the result of the first appeal—the erroneous conclusion by the Court of Appeals that a Chapter 119 hearing was required—that forced the State Board to hold such a hearing. The dispute was a continuing one, and the judgments of the Court of Appeals and the Common Pleas Court, unfortunately, caused the dispute to be prolonged due to an erroneous conclusion of law reached by the Court of Appeals and adhered to by the Court of Appeals. There clearly, however, was no division or change in position which would in any way justify treating the appeals as separate cases. They were, instead, different phases and repeated appeals in the same continuing and prolonged effort of the State Board to effect a valid dissolution of the Bratenahl Local School District, which began with the refusal of the State Board in February, 1970, to grant any further exception to Bratenahl and which ended with this Court's decision that such a refusal did *not* require the Chapter 119 hearing which the Court of Appeals had erroneously held was required.

It is very significant to note that Bratenahl, in its motion for rehearing, recognizes and agrees that the Supreme Court of Ohio may consider an issue on a subsequent appeal even though, as in this case, the Court had previously overruled a motion to certify an earlier appeal which would have brought the issue before the Court at that time, *Pengelly v. Thomas,* 151 Ohio St. 51 (1949) (Bratenahl motion for rehearing, pp. 4-5). This, of course, is exactly what this Court has done in the present case

and, in doing so, the Court has rendered an important decision governing the appealability of administrative agency orders in Ohio. Finally, Bratenahl also does *not* dispute or even challenge this Court's legal conclusion that the 1970 order was *not subject to appeal* on the authority of *Fortner v. Thomas,* 22 Ohio St. 2d 13 (1970) and *M. J. Kelly Co. v. Cleveland,* 32 Ohio St. 2d 150 (1972) (Bratenahl motion for rehearing, p. 4). In the face of these admissions and the reality of the undisputed facts, any assertion by Bratenahl that this Court reached an improper result is clearly unfounded.

Bratenahl's second contention, briefly alluded to in its motion, is that in some manner the property of the Bratenahl Local School District is being taken without the due process of law guaranteed by the state and federal constitutions (Bratenahl motion for rehearing, pp. 6-7). Such a contention is totally without merit and completely ignores the undisputed fact that Bratenahl *agreed* to its own dissolution on July 1, 1970, and *agreed* that on that date it would be joined with and made a part of the Cleveland City School District (R. 110-111). The dissolution of the Bratenahl Local School District was accomplished by virtue of the State Board's order of June 10, 1968, which, pursuant to Bratenahl's request, delayed the dissolution until July 1, 1970, but specifically provided that on that date the district would cease to exist and would be merged with the Cleveland City School District (R. 112-113). Bratenahl agreed to the dissolution, did not appeal the order of dissolution, and it certainly cannot be contended that the State Board's mere refusal to change the agreed upon dissolution date deprived Bratenahl of *any* statutory or constitutional right of any nature.

The third contention of Bratenahl is that conditions have changed since July 1, 1970, primarily due to the

institution by Bratenahl of a new high school, and that in some undefined manner this new event of Bratenahl's own making should nullify the State Board's order—agreed to by Bratenahl—dissolving the local school district as of July 1, 1970 (Bratenahl's motion for rehearing, pp. 7-11). The cases cited by Bratenahl deal with situations in which the legislature changed the statutory law and are totally inapplicable to the present case. Here, to the contrary, the dissolution statute under which the State Board acted in 1968 remained unchanged; the 1968 dissolution order which Bratenahl asked for and received remained in effect as of July 1, 1970, the dissolution date agreed upon by the parties; and whatever Bratenahl chose to do or not to do after that date could not affect, without the consent of the State Board, the dissolution order of June 10, 1968. The questions involving the new high school, whether it met the state standards or not, and all other issues arising from Bratenahl's unilateral efforts to escape the 1968 order and the dissolution date of July 1, 1970, were meaningless if the State Board's refusal to change that order and to extend the dissolution date was properly done without an administrative hearing. As this Court has now held, that refusal did *not* require a Chapter 119 hearing because it was *not* an "adjudication" under Revised Code 119.06; there was no right of appeal from that refusal under Revised Code 119.12; the June 10, 1968 order remained in effect dissolving the district as of July 1, 1970; and the subsequent issues which were litigated as a result of the erroneous decision of the Court of Appeals, as this Court pointed out, were therefore irrelevant.

The fourth and final contention of Bratenahl is that some undefined "public policy" should control this Court —rather than the established law of Ohio—and that "public policy requires rejection of the order of the State

Board" (Bratenahl motion for rehearing, pp. 11-14). In this concluding argument, Bratenahl couples vagueness (the "public policy" is not defined) with a vituperative attack on the State Board. The basis of the argument, however, is that in some way "public policy" overrides the law and that "public policy" requires that Bratenahl be allowed to continue to operate a high school because it meets most (but not all) of the required standards for a high school. Aside from the fact that the issues surrounding the merit or lack of merit of this school were previously argued and that a motion for rehearing "must not constitute a reargument of the case" (Rule IX, Rules of Practice of the Supreme Court of Ohio), the entire question of this school meeting state standards, in light of the Court's decision, is irrelevant in this case. This case was resolved on the basis of undisputed facts and well established law—neither of which is challenged by Bratenahl's motion.

CONCLUSION

All litigation must finally be concluded, and clearly the day has arrived when the protracted dispute between the Bratenahl Board of Education and the State Board of Education must come to an end. The decision of this Court in this case was perceptive, well reasoned and strongly supported by long established law in this state. It is an important decision in the field of administrative law and will long serve as a guide to lower courts dealing with the question of what constitutes an appealable order under Revised Code Chapter 119. No valid reason has been advanced for any rehearing; the motion for rehearing should be denied; and this litigation should be finally terminated.

Respectfully submitted,

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[50] BRATENAHL REPLY IN SUPPORT OF REHEARING

Nos. 77-171 and 77-172

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
of Franklin County, Ohio

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BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
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Appellants-Respondents.

REPLY OF BRATENAHL BOARD OF EDUCATION IN SUPPORT OF REHEARING

The State Board, by its effort to shield these causes from scrutiny, underscores the wisdom of Appellate Courts in providing, as does this Court, opportunity for rehearing. The State Board, as an analysis of its argument will show, proves:

I. *This Court, under misapprehension, has decided a case not before it.* The State Board's belated effort to pretend that it really was the first administrative proceeding (of 1970) that was open here for review, will collapse when one realizes that:

(a) *The parties, issues, and the relief sought were different* in the two proceedings. Recall that:

(i) *The parties were different.* In the first administrative proceeding, in 1970, Bratenahl was the moving party and the State Board the respondent; in the second, in 1973, the parties were reversed: the State Board was the moving party and Bratenahl the respondent.

(ii) *The issues were different.* In the first administrative proceeding, in 1970, the basic issue was whether Bratenahl was to be authorized to create its own high school, within fifteen additional months; in the second, in 1973, the basic issue was whether Bratenahl was then already in compliance with R. C. 3311.29—the statute requiring a school system to maintain 12 grades.

(iii) *The relief sought was different.* In the first administrative proceeding Bratenahl, on its own, and as the moving party, sought an opportunity to enable it to *comply* with R. C. 3311.29; in the second, in 1973, the State Board, on its own, and as the moving party, sought to *dissolve* Bratenahl, despite Bratenahl's admitted maintenance of 12 grades, in compliance with R. C. 3311.29, since September 1971.

The current, basic issue of statutory construction of R. C. 3311.29, was in no way involved in the 1970 proceedings.

That statute has never been construed by this Court—not even in these cases.

(b) *Contrasted with the argument the State Board now makes in hope to escape rehearing,* is the State Board's argument before this Court on the merits. The State Board's argument then was directed solely to the second administrative appeal, of 1973; no one argued that the 1970 State Board order was even before the Court—much less that it was "The central issue * * *." To the contrary, the State Board assured this Court that "*the origin of this appeal is the October 14, 1974*" order of dissolution.

(c) *The State Board has no answer for the independent declaratory judgment proceeding* filed in the Common Pleas Court separately from the first administrative appeal, wherein, in 1973, that Court adjudged "The Bratenahl Local School District legally exists * * *." Even if everything said in the State Board's effort to escape rehearing were accepted at face value, that declaratory judgment would still be a bar to the State Board's position.

The State Board did not appeal from that judgment.

That judgment now is *res judicata* of the issue.

The State Board's position of silence on this issue is that if the Court will only forget about that portion of that final, unappealed and separate declaratory judgment, it will also.

II. *The property of the Bratenahl School District is taken without the due process of law guaranteed by both the Ohio and the federal constitutions.* If this Court's judgment stands, Bratenahl will have been despoiled of its property by fiat of an administrative agency without review by any court, despite the all pervading statutory mandate of R. C. 3301.13 that:

> "In the exercise of *any* of its *functions* or *powers* * * * the department of education [which includes the State Board, see R. C. 3301.13, 2d paragraph] *shall* be subject to Chapter 119 of the Revised Code."

The State Board's sole, and irrelevant, answer is that prior to the first administrative proceeding Bratenahl agreed to the dissolution of its school district. That is an issue involved in the 1970 administrative proceeding; it is not an issue involved in the subsequent 1973 administrative proceeding.

Moreover, what the State Board does not say is that the State Board, without advising Bratenahl, *changed its regulations*. For the regulation based on the number of students (that Bratenahl could not meet) the State Board substituted the credit units regulation (which Bratenahl could, can, *and does* meet).

This Court under Article IV, Section 2(B)(1)(f) of the Ohio Constitution has not only the power, but the duty, in any case on review to do whatever is necessary for its *complete* determination. Without rehearing, there will be no resolution of the questions raised in the second administrative appeal.

III. *Dissolution of the Bratenahl School District, in 1974, may not lawfully be determined on the basis of conditions as they were in 1970.* To do so would in itself be a flagrant denial of due process.

The State Board's only, and inadequate as well as irrelevant, answer is that the rule Bratenahl relies upon has to do (p. 5) only "with situations in which the *Legislature changed* the statutory law * * *." To the contrary the rule "applies with equal force where the change is made by an administrative agency * * *." 393 U.S. at 282.

IV. *Public policy requires rejection of the order of the State Board.* The folly of the State Board's position

is that it would destroy outright, a school system that meets every requirement of Ohio law, and is prepared to qualify under every regulation of the State Board.

If the State Board regards the issue of public policy as (p. 6) "a vituperative attack" on the State Board, it must be said that that "vituperation" springs from the unvarnished factual recital on pages 12-14 of the Bratenahl petition for rehearing of the incredible conduct of the State Board. This, in contrast to the promise contained in the Minimum Standards for Ohio High Schools:

> "Members of the Department of Education will *welcome* opportunities to *assist* schools in *every* way possible to achieve suitable programs."

CONCLUSION

This Court should surely reexamine the judgment here requested.

Respectfully submitted,

/s/ THOMAS V. KOYKKA
/s/ WILLIAM S. BURTON
/s/ JOHN J. CHESTER

[51] SUPREME COURT OF OHIO DENIAL OF REHEARING

(Dated May 5, 1978)

No. 77-172

THE STATE OF OHIO,
CITY OF COLUMBUS.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

[52] STAY GRANTED BY OHIO SUPREME COURT

(Dated June 29, 1978)

Nos. 77-171 and 77-172

SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE OF OHIO, ex rel. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT AND BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellees,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

ENTRY

(FRANKLIN COUNTY)

Upon consideration of the motion of appellees to enlarge the stay previously granted by this court, it is ordered that such motion be and hereby is allowed to the extent that the previously granted stay shall remain in effect until ten days after the date the appellees file a petition for writ of certiorari in the Supreme Court of the United States.

Supreme Court, U. S.
FILED
AUG 29 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,

Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, Superintendent of Public Instruction and Secretary, State Board of Education,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(A) Did the Supreme Court of Ohio properly determine that the mere refusal by the State Board of Education of Ohio in 1970 to modify an agreed upon and unappealed 1968 order dissolving and merging a local school district did not constitute an "adjudication" and was not appealable under the provisions of the Ohio Administrative Procedure Act, *Ohio Revised Code* 119, *et seq.*? 1

(B) Did the Supreme Court of Ohio properly determine that notwithstanding its denial of certiorari to review a judgment of a Court of Appeals in 1971, it may nevertheless consider questions raised in that first appeal, as well as on subsequent appeals from the Court of Appeals, when the Supreme Court of Ohio subsequently did grant certiorari in this case? 1-2

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(A) The question of whether a mere refusal of a state agency to modify an order to dissolve and merge a school district (agreed to and unappealed by the local school district) is an "adjudication" under the Ohio Administrative Procedure

Page

Act, *Revised Code* 119, *et seq.*, involves purely local, nonfederal issues under Ohio statutes. 6

(B) The decision of the Ohio Supreme Court is entirely consistent with the substantive law of Ohio and with the decisions of the Supreme Court of the United States concerning issues presented in a former motion to certify which was denied but which issues were later considered in a subsequent appeal involving the same dispute between the parties. 7

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO,
LOCAL SCHOOL DISTRICT,

Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO,
DEPARTMENT OF EDUCATION OF OHIO,
FRANKLIN B. WALTER, Superintendent of
Public Instruction and Secretary, State Board of Education,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED

(A) Did the Supreme Court of Ohio properly determine that the mere refusal by the State Board of Education of Ohio in 1970 to modify an agreed upon and unappealed 1968 order dissolving and merging a local school district did not constitute an "adjudication" and was not appealable under the provisions of the Ohio Administrative Procedure Act, *Ohio Revised Code* 119, *et seq*?

(B) Did the Supreme Court of Ohio properly determine that notwithstanding its denial of certiorari to review

a judgment of a Court of Appeals in 1971, it may nevertheless consider questions raised in that first appeal, as well as on subsequent appeals from the Court of Appeals, when the Supreme Court of Ohio subsequently did grant certiorari in this case?

II. STATEMENT OF CASE

This case involves the application of an Ohio statute, *Revised Code* 3311.29, which required all school districts in Ohio to have twelve grades of school, effective July 1, 1968 (Petitioner's A 4). The Village of Bratenahl did not have the requisite twelve (12) grades on July 1, 1968, but in an effort to delay the required statutory joinder with the adjacent Cleveland City School District, it requested that the Ohio State Board of Education postpone the joinder for two years until July 1, 1970 (Pet. A 2). To accomplish this delay, *the Bratenahl Board of Education* on June 8, 1968, passed a resolution which stated, *inter alia*:

> "Be it further resolved that this Board recognizes that, effective July 1, 1970, the Bratenahl Local School District will cease to exist and its territory will be joined with and made a part of the Cleveland City School District."
>
> (Pet. A 4)

The State Board of Education granted the Bratenahl Board's request to postpone the merger and on June 10, 1968, ordered the Bratenahl Local School District dissolved and joined with the Cleveland City School District, effective July 1, 1970 (Pet. A 9). *No appeal was taken from this resolution* (Pet. A 113). In addition to its agreement that it would merge with the Cleveland City School District on July 1, 1970, the Bratenahl Board also agreed that during the two year period before dissolution, the Bratenahl Board

would institute a program to bring some black students into its school system (Pet. A 3). The Bratenahl Board did this by importing selected black students from one elementary school in the Cleveland City School District. Of primary importance, however, is the undisputed fact that the Bratenahl Board and the Ohio State Board of Education, *agreed* in 1968 that the Bratenahl Local School District would be dissolved on July 1, 1970, and would be joined with the surrounding Cleveland City School District on that date.

On July 1, 1970 — the agreed upon dissolution date — the Bratenahl Local School District still did not have twelve (12) grades of school, but instead of dissolving pursuant to the agreed order and resolution, the Bratenahl Board asked the State Board of Education to change its 1968 order so as to further postpone the dissolution and merger (Pet. A 11). Upon refusal of the Ohio State Board of Education to change its 1968 order, Bratenahl then commenced actions designed to avoid compliance with the 1968 order of the State Board of Education. First, it appealed from the mere refusal of the Ohio State Board to change the agreed upon order of 1968 (Pet. A 16); and second, it started a high school in an abandoned Nike missile base — a high school which never met even the legal minimum standards for a high school in the State of Ohio (Pet. A 108).

It was this refusal of the State Board of Education to change the agreed upon 1968 order which started, in 1970, the dispute between the parties. Every proceeding between these parties since that time has had its origin in the State Board of Education's refusal to change its preexisting order of 1968.

On September 22, 1971, the Supreme Court of Ohio overruled the State Board of Education's motion for cer-

tiorari from the judgment of the Court of Appeals, which judgment had held that the 1970 order of the State Board of Education refusing to modify its 1968 order was an "adjudication" and appealable pursuant to the provisions of the Ohio Administrative Procedure Act, *Ohio Revised Code* 119, *et seq.* (Pet. A 31). Litigation between the parties then continued until finally, in 1977, the Ohio Supreme Court heard, for the first time on the merits, this protracted dispute between the parties (Pet. A 110). Before the Ohio Supreme Court by that time were three cases between the instant parties which had been adjudged by the Court of Appeals, consisting of an administrative appeal case and two consolidated mandamus cases brought by the Bratenahl Board (Pet. A 113). The opinion of the Ohio Supreme Court on March 22, 1978, disposed of all the cases on the basic issue formerly presented to the Court in the State Board of Education's motion for certiorari in 1971 (Pet. A 114). The decision of the Ohio Supreme Court correctly held that the mere refusal of a state agency to change an agreed upon order, two years after the order was issued, is not an adjudication under the Ohio Administrative Procedure Act, *Ohio Revised Code* 119, *et seq.*, and thus, it is not an appealable action under the Ohio Act (Pet. A 111).

Since the denial of a rehearing on this matter by the Ohio Supreme Court on May 5, 1978 (Pet. A 150) and the denials by Mr. Justice Stewart and the United States Supreme Court of a stay of the judgment of the Ohio Supreme Court on June 19, 1978, and June 26, 1978, respectively (Respondents' A 1a, 2a), two new actions involving the instant parties have been initiated.

The first new action, filed June 28, 1978, by the Bratenahl Board in the Ohio Court of Appeals involves a complaint in prohibition and mandamus against the instant Respondents seeking *inter alia* a writ to prohibit the dissolution of the Bratenahl Local School District (Resp. A 4a). The complaint sets forth the change in the Ohio statute, *Revised Code* 3311.29, as the basis for the issuance of the writs. This same issue of the change in the Ohio statute is presented in this instant Petition for Writ of Certiorari (pp. 9, 10, 21, 22). This new action was dismissed *sua sponte* by the Ohio Court of Appeals and is presently pending on appeal to the Ohio Supreme Court (Resp. A 10a).

The second new action involves a taxpayer class action against the instant parties for an injunction preventing the enforcement of the State Board order merging the Bratenahl Local School District into the Cleveland City School District on the basis that *Ohio Revised Code* 3311.29 is unconstitutional. This action was filed on August 2, 1978, in the Common Pleas Court of Cuyahoga County, Ohio (Resp. A 12a).

III. REASONS FOR DENYING THE WRIT OF CERTIORARI

The decision of the Supreme Court of Ohio should not be reviewed because:

(A) The question of whether a mere refusal of a state agency to modify an order to dissolve and merge a school district (agreed to and unappealed by the local school district) is an "adjudication" under the Ohio Administrative Procedure Act, *Revised Code* 119, *et seq.*, involves purely local, nonfederal issues under Ohio statutes.

(B) The decision of the Ohio Supreme Court is entirely consistent with the substantive law of Ohio and with the decisions of the Supreme Court of the United States concerning issues presented in a former motion to certify which was denied but which issues were later considered in a

subsequent appeal involving the same dispute between the parties.

Therefore, there is an obvious absence of any special and important reasons for this Court to review the case, and Petitioner's request for a Writ of Certiorari should be denied.

(A) The question of whether a mere refusal of a state agency to modify an order to merge two school districts (agreed to and unappealed by the local school district) is an "adjudication" under the Ohio Administrative Procedure Act, Revised Code 119, et seq., involves purely local, nonfederal issues under Ohio statutes.

Petitioner's argument that it was denied due process because the 1970 administrative order of the State Board of Education was issued without notice and a hearing completely ignores the fact that the 1970 administrative order was merely a refusal to modify the earlier 1968 administrative order of dissolution and merger of the Bratenahl Local School District, effective July 1, 1970 (Pet. A 15). Petitioner also ignores the fact that it had *agreed* in its own written resolution to the 1968 dissolution and merger order (Pet. A 4) and that *it did not appeal* the 1968 dissolution and merger order (Pet. A 113). These fundamental, undisputed facts clearly demonstrate that no issue of due process is involved in this case.

As the Ohio Supreme Court observed:

> "Clearly the act of refusing to change one's position is not equivalent to the act of deciding in the first instance which position to take among several alternatives. The 'rights,' 'privileges,' and 'benefits' of the Bratenahl Local School District to remain in existence after July 1, 1968, were determined by the state board in its resolution dated June 10, 1968, and were not in some way resurrected or placed back into issue upon the subsequent request of appellee [Petitioner] in 1970 for an additional exception."
>
> (Pet. A 116)

Thus, Petitioner's belated claim of a denial of due process concerning a state agency's refusal to modify an order issued two years previously, unappealed and agreed to by the Petitioner, is obviously without merit.

This Court has repeatedly held that it is without jurisdiction to review a decision of a state court unless it appears affirmatively from the record, not only that a federal question was presented but that the decision of the federal question was necessary to the determination of the cause. *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U.S. 206, 212 (1937). There is absolutely no federal question presented by this case.

(B) The decision of the Ohio Supreme Court is entirely consistent with the substantive law of Ohio and with the decisions of the Supreme Court of the United States concerning issues presented in a former motion to certify which was denied but which were later considered in a subsequent appeal involving the same dispute between the parties.

Petitioner also asserts that it was denied due process because the Ohio Supreme Court allegedly disregarded prior lower court judgments between the same parties on the same issue, *i.e.*, the appealability of the 1970 action by the State Board of Education. This same issue, however, was presented to the Ohio Supreme Court in a motion for certiorari in 1971 which the Ohio Supreme Court overruled

at that time (Pet. A 31). The Ohio Supreme Court correctly noted in its subsequent opinion of March 22, 1978, that where an issue is decided by a Court of Appeals in a prior decision in which the Ohio Supreme Court denied certification of the record, the Ohio Supreme Court is not precluded from subsequently reviewing that issue and cited *Pengelly* v. *Thomas,* 151 Ohio St. 51 (1949), in support of this proposition (Pet. A 114).

The Ohio Supreme Court's subsequent review of an issue presented in a former motion for certiorari is in accord with the decisions and practice of the Supreme Court of the United States:

> *Hughes Tool Company* v. *Trans World Airlines,* 409 U.S. 363, 365 (1973);
>
> *Mercer* v. *Theriot,* 377 U.S. 152, 153-54 (1964);
>
> *Chase National Bank* v. *Citizens Gas Company,* 314 U.S. 63 (1941).

Not all of the actions commenced by Petitioner are set forth in its Appendix, inasmuch as Petitioner had also filed two separate actions in mandamus which were also disposed of by the Ohio Supreme Court's decision on March 22, 1978 (Pet. A 113-114), as well as the most recent action in mandamus and prohibition pending on appeal in the Ohio Supreme Court (Resp. A 4a). Each and every proceeding has had its origin in the State Board of Education's refusal to modify its order of 1968. The Ohio Supreme Court heard for the first time on the merits the dispute between the parties and rendered its decision on March 22, 1978. Under the principles established by both this Court and the Ohio Supreme Court, the Ohio Supreme Court properly considered issues which were presented in a former motion for certiorari.

IV. CONCLUSION

The decision of the Ohio Supreme Court is a well reasoned opinion involving purely local, nonfederal issues under state statutes. It is respectfully submitted that this case contains no special and important issues which would make it appropriate for review and consideration by this Court and that therefore, the Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. HOLSCHUH

ALEXANDER, EBINGER, HOLSCHUH, FISHER & McALISTER

17 South High Street
Columbus, Ohio 43215
(614) 221-6345

Counsel for Respondents

APPENDIX A

[PETITIONER'S APPLICATION FOR STAY OF JUDGMENT OF SUPREME COURT OF OHIO, DENIED BY MR. JUSTICE STEWART]

(Filed June 19, 1978)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 20, 1978

Thomas V. Koykka, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: *Board of Education, Bratenahl Local School District* v. *State Board of Education of Ohio, et al., A-1066*

Dear Mr. Koykka:

Your application for stay in the above-entitled case has been presented to Mr. Justice Stewart, who has endorsed thereon the following:

"Application denied
June 19, 1978
Potter Stewart"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By
Laurence P. Gill
Deputy Clerk

th

cc: John D. Holschuh, Esquire
Alexander, Ebinger, Holschuh, Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

APPENDIX B

[PETITIONER'S APPLICATION FOR STAY OF JUDGMENT OF SUPREME COURT OF OHIO, DENIED BY SUPREME COURT OF UNITED STATES]

(Filed June 26, 1978)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 26, 1978

Thomas V. Koykka, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: *Board of Education, Bratenahl Local School District* v. *State Board of Education of Ohio, et al., A-1066*

Dear Mr. Koykka:

The Court today entered the following order in the above-entitled case:

"The application for stay of the judgment of the Supreme Court of Ohio, presented to Mr. Justice Stevens and by him referred to the Court, is denied."

Very truly yours,

MICHAEL RODAK, JR., Clerk
by
Francis J. Lorson
Deputy Clerk

cc: John D. Holschuh, Esquire
Alexander, Ebinger, Holschuh, Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

APPENDIX C

[COMPLAINT IN PROHIBITION AND MANDAMUS,
CASE NO. 78AP-414,
IN COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO]

(Filed June 28, 1978)

IN THE COURT OF APPEALS,
FRANKLIN COUNTY, OHIO

CASE NO. 78AP-414

STATE OF OHIO, ex rel., BOARD OF EDUCATION,
BRATENAHL LOCAL SCHOOL DISTRICT,
Relator,

vs.

STATE BOARD OF EDUCATION OF OHIO and
DEPARTMENT OF EDUCATION OF OHIO and
FRANKLIN B. WALTER, SECRETARY,
STATE BOARD OF EDUCATION OF OHIO and
SUPERINTENDENT OF PUBLIC INSTRUCTION,
Respondents.

COMPLAINT IN PROHIBITION AND MANDAMUS

Relator, Board of Education, Bratenahl Local School District, being a duly constituted school district in the

State of Ohio and "a body politic and corporate and as such, capable of suing and being sued," pursuant to R.C. 3313.17, for its Complaint in Prohibition and Mandamus states:

1. Respondent, State Board of Education of Ohio, is authorized and required under R.C. 3301.16 to "charter school districts and individual schools within each [school] district."

2. Respondent, Department of Education of Ohio, is, under R.C. 3301.13, the administrative unit through which legislative mandates are carried out and policies of the State Board of Education and the duties of the Superintendent of Public Instruction are administered, including, but not limited, to the development and administration of prerequisite steps and procedures to be followed by schools which desire to achieve ultimate evaluation/accreditation upon demonstration of compliance with applicable State standards.

3. Respondent, Franklin B. Walter, is the State Superintendent of Public Instruction, and Secretary of the State Board of Education of Ohio, pursuant to R.C. 3301.09.

4. On October 14, 1974, the State Board of Education of Ohio adopted a RESOLUTION AND ORDER ON BRATENAHL LOCAL SCHOOL DISTRICT, copy attached as Exhibit 1, wherein the State Board ordered the dissolution of the Bratenahl Local School District pursuant to the then applicable provisions of R.C. 3311.29, copy attached as Exhibit 2, which statute then required the dissolution of any school district which, after July 1, 1968, did not maintain 12 grades.

5. The Bratenahl District did not maintain 12 grades within its district prior to September, 1971, but has maintained 12 grades within its dictrict since that date, with its grades 9 through 12 being housed, since September, 1975, in a new, specially designed, centrally located high school building.

6. Effective September 30, 1975, the legislature amended R.C. 3311.29 by deleting therefrom any reference to any date after which all Ohio school districts must maintain 12 grades. See Exhibit 3 attached for the full text of R.C. 3311.29, as amended September 30, 1975.

7. The Ohio General Assembly, having deleted from R.C. 3311.29 any reference to a date, after which all Ohio school districts must maintain 12 grades, and the Bratenahl District having maintained 12 grades continuously from September, 1971 to date; the Bratenahl District is in full compliance with all provisions of R.C. 3311.29, as amended. Therefore, the State Board is without jurisdiction to dissolve the Bratenahl District now, in 1978, based upon a prior time requirement which was removed by the legislature in its 1975 amendments to R.C. 3311.29.

8. Unless the State Board of Education is prohibited from doing so by a Writ of Prohibition, issued by this Court, the State Board will summarily dissolve the Bratenahl District by enforcing the October, 1974 State Board dissolution order, as of July 8, 1978, when the existing stay of the March, 1978 judgment of the Supreme Court is due to expire, thereby depriving the Bratenahl District of its very life and stripping away its properties without the

due process of law which is promised under the Fourteenth Amendment to the U.S. Constitution and under Sections 1 and 19 of Article I of the Ohio Constitution, for which denial, the Bratenahl District has no plain and adequate remedy at law, or otherwise.

9. Under the date December 11, 1975, after the September, 1975 amendment of R.C. 3311.29, the Bratenahl District submitted to Respondents, the State Board, the Department of Education and the Superintendent of Public Instruction, its request that the Bratenahl high school be evaluated for accreditation purposes, looking toward the ultimate issuance of a charter for the Bratenahl high school. Respondents at all times, have failed and refused to take meaningful action upon that request, despite Respondents' statutorily mandated duty to do so under R.C. 3301.12A, 3301.13 and 3301.16. (See Exhibits 4, 5 and 6 for full text of these statutorily mandated duties).

10. Unless this Court shall require Respondents, by a Writ of Mandamus, to act upon the Bratenahl District's pending request seeking participation in standard evaluation/accreditation procedures for its high school, that high school, established in September, 1971, along with its elementary grades, established in the mid 1890's will be stripped away from the Bratenahl District without its high school ever having been evaluated for the issuance to it of a high school charter, even though R.C. 3301.16 mandatorily requires that the State Board *shall* issue charters for individual schools, thereby also denying to the Bratenahl District the due process of law which is promised under the Fourteenth Amend-

ment to the U.S. Constitution and under Sections 1 and 19 of Article I of the Ohio Constitution, for which denial the Bratenahl District has no plain and adequate remedy at law, or otherwise.

WHEREFORE, Relator, Board of Education, Bratenahl Local School District prays that Writs of Prohibition and Mandamus be issued directed to Respondents, the State Board of Education, the Department of Education of Ohio and the Superintendent of Public Instruction, (1) to prohibit the dissolution of the Bratenahl District under the October, 1974 State Board dissolution order and (2) to take meaningful action on the pending request of the Bratenahl District whereunder Bratenahl is seeking to have its high school participate in standard State evaluation/accreditation procedures, or in the event such writs be not issued, that alternative Writs of Prohibition and Mandamus be issued (1) prohibiting Respondents from taking action to dissolve the Bratenahl District under the October, 1974 State Board dissolution order and (2) requiring Respondents to take action, upon the pending request of the Bratenahl District for evaluation/accreditation of its high school; or be compelled to show valid cause, at an expedited hearing of this matter, on or before July 8, 1978, why Respondents should not be ordered and compelled to do so. In addition, the Bratenahl District prays for such other and further relief as may be equitable and proper according to law, including their costs and attorneys' fees.

/s/ WILLIAM S. BURTON

ARTER & HADDEN

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(216) 696-1144
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(614) 221-4000

Attorneys for Relator,
Board of Education, Bratenahl
Local School District

APPENDIX D

[NOTICE OF APPEAL IN CASE NO. 78AP-414 TO SUPREME COURT OF OHIO]

(Filed June 30, 1978)

IN THE COURT OF APPEALS,
FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

CASE NO. 78AP-414

STATE OF OHIO, ex rel., BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,

Relator,

vs.

STATE BOARD OF EDUCATION OF OHIO and DEPARTMENT OF EDUCATION OF OHIO and FRANKLIN B. WALTER, SECRETARY, STATE BOARD OF EDUCATION OF OHIO and SUPERINTENDENT OF PUBLIC INSTRUCTION,

Respondents.

NOTICE OF APPEAL

Notice is hereby given that the Board of Education, Bratenahl Local School District hereby appeals to the

Supreme Court of Ohio from the judgment entry entered herein June 29, 1978, in the Court of Appeals of Franklin County, Ohio, Tenth Appellate District.

This appeal involves a Complaint in Prohibition and Mandamus which originated in the Court of Appeals, and is an appeal as a matter of right pursuant to Article IV, Section 2 (B) (2) (a) (i) of the Constitution of Ohio.

/s/ THOMAS V. KOYKKA

/s/ WILLIAM S. BURTON

ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio 44115

/s/ JOHN J. CHESTER
CHESTER, SAXBE, HOFFMAN & WILLCOX
Eight East Broad Street
Columbus, Ohio 43215

APPENDIX E

[CLASS ACTION COMPLAINT, CASE NO. 78-987399,
IN COURT OF COMMON PLEAS OF
CUYAHOGA COUNTY, OHIO]

(Filed August 2, 1978)

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. 78-987399

SIDNEY STROMBERG,
324 Corning Drive, Bratenahl, Ohio 44108,
on behalf of himself and all others similarly situated,
Plaintiff,

vs.

BOARD OF EDUCATION,
VILLAGE OF BRATENAHL, OHIO,
11404 Lake Shore Boulevard, Bratenahl, Ohio 44108,

and

BOARD OF EDUCATION,
CITY OF CLEVELAND, OHIO,
1380 East 6th Street, Cleveland, Ohio 44114,

and

DEPARTMENT OF EDUCATION, STATE OF OHIO,
65 South Front Street, Columbus, Ohio 43215,

and

WILLIAM J. BROWN, ATTORNEY GENERAL,
STATE OF OHIO,
17th Floor, 30 East Broad Street, Columbus, Ohio 43215,
Defendants.

COMPLAINT

1. Plaintiff is a taxpayer, resident and elector of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

2. Plaintiff brings this class action on behalf of himself and all others similarly situated as residents, taxpayers and electors of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

3. The approximate number of members of this class exceeds 1,000 and is so numerous that joinder of all members is impractical.

4. The questions of law and fact relative to this controversy are common to all members of the class; that Plaintiff's claim is typical to the claim of the class; that Plaintiff will fairly and equitably project the interest of the class.

5. Adjudication as to this Plaintiff would be dispositive of the interest of the other members of this class not parties to this action and the questions of law and fact common to the members of this class predominate any questions affecting individual members and that this class action is the only means available for the fair and efficient adjudication of this controversy.

6. Plaintiff states that the Defendant, the Ohio State Department of Education, under the authority of Section

3311.29 R.C., has issued an order merging the Bratenahl School District with the Cleveland School District; that Section 3311.29 R.C. includes a mandatory directive transferring funds and property of the merging school district to the new school district; that by reason thereof, the transfer contained in Section 3311.29 R.C. conveys funds and property of the Bratenahl School District to the Defendant, Cleveland School Board, in excess of $1,000,000.00; that Plaintiff and all members of this class, as taxpayers, have an equitable interest in said property and funds, and that said property and funds are held in trust for them by the Defendant, Bratenahl Board of Education.

7. Plaintiff states that Section 3311.29 R.C., providing for the mandatory transfer of property and funds by administrative order of merger from one school district to another is constitutionally repugnant and in violation of the due process clause of the Constitutions of the United States and the State of Ohio.

8. The transfer and conveyance of said funds and property to the Defendant, Cleveland Board of Education, by reason of said order of merger issued by the Defendant, Ohio State Department of Education, will cause Plaintiff and all members of the class to suffer irreparable damage.

WHEREOF, Plaintiff demands that the Court adjudge:

1. That Section 3311.29 R.C., authorizing the merger of school districts and including the mandatory transfer and conveyance of funds and property by administrative order from one district to another is unconstitutional.

2. That the order and/or orders pending and issued by the Ohio Department of Education under authority of Section 3311.29 R.C. are invalid.

3. That the Defendant, Ohio Department of Education,

as well as the Defendant, Cleveland Board of Education and Bratenahl Board of Education, be temporarily restrained and enjoined from enforcing and/or instituting said order of merger, and that said injunctive relief be made permanent upon the final hearing of this cause.

4. That the Court make a determination of the fair and reasonable value of the services rendered by Plaintiff's attorney and that he be granted an order allowing payment of said attorney's fees, together with his costs.

/s/ JAMES A. CHIARA
1914 Superior Building
Cleveland, Ohio 44114
(216) 861-3432

JOHN J. SHEEHAN
1550 Hanna Building
CLEVELAND, OHIO 44115
(216) 696-8860

Attorneys for the Plaintiff

Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978
No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,
Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, Superintendent of Public Instruction and Secretary, State Board of Education,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Attorneys for Petitioner

September 14, 1978

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

Supreme Court of the United States

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,
Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, Superintendent of Public Instruction and Secretary, State Board of Education,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Questions are not answered by begging them.

Respondents manage to do just this by pretending serious constitutional questions are not here (and that only state issues are raised) by directing questions to earlier State Board orders that were disposed of by prior final judgments.

Respondents disguise the fact that those prior orders were *considered, vacated and held for naught* in the prior final judgments of August 24, 1973, in the statutory review

(A45), and of August 30, 1973, in the separate declaratory judgment action. (A67.)

The Ohio Board of Education (pp. 7-8) relies on cases wherein successive appeals have been taken to courts of last resort, in the *same* case.

Such cases are irrelevant. Here, final unappealed judgments separate the instant appeal from all previous appellate activity.

The judgments in the prior Bratenahl cases were not before the Ohio Supreme Court in March 1978. Even if they had been, that court could not constitutionally, in 1978, re-open them and then hold Bratenahl dissolved solely by administrative fiat, without notice or hearing. (A115.)

The State Board position, if adopted, would mark the end of the doctrine of *res judicata.*

The inexplicable departure from the fundamental tenets of *res judicata* by the Ohio Supreme Court in this case is evident from a journal entry of the Court of Appeals. That court had previously ruled in Bratenahl's favor twelve consecutive times. It most recently has said:

> "[T]he Supreme Court in *State, ex rel. Bd. of Education v. State Board of Education* (1978), 53 Ohio St. 2d 173 specifically stated that [Bratenahl] 'was properly dissolved on July 1, 1970, by the state board' having *apparently*[1] determined prior judgments of this Court and the Court of Common Pleas holding to the contrary to be void and of no effect since those judgments had become final prior to the institution of the proceedings which were on appeal before the Supreme Court in that case . . ." AS 8.[2]

1. Emphasis supplied throughout.

Where, as here, the State Board "lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids." *Barksy v. Board of Regents,* 347 U.S. 442, 470 (1954) (Frankfurter, *J.,* dissenting).

Although the State Board now contends that this appeal somehow relates back to long terminated appeals taken from the February 1970 State Board Order—when this case was presented to the Ohio Supreme Court, the State Board insisted (on page 2 of the State Board's brief) that:

> *"the origin of this appeal is the October 14, 1974,* unanimous resolution and order of the State Board * * *."

Because the State Board chooses to rely upon sleight-of-hand, it leaves unanswered critical constitutional issues, viz.:

(1) The State Board's Order would destroy the Bratenahl School System and take its property, as the Supreme Court of Ohio put it, "despite the fact *there was no notice or opportunity to be heard* afforded Bratenahl." (A116.)

(2) The State Board's Order would destroy rights vested in Bratenahl by two final judgments (of

2. AS refers to the annexed supplementary Appendix of Bratenahl setting forth the Court of Appeals journal entry in Case No. 78 AP-414, entered June 29, 1978. Since the State Board, as Appendix C, attaches the Complaint and Notice of Appeal from this journal entry, Bratenahl attaches the journal entry.

August 24, 1973 (A45), and August 30, 1973 (A67)) which this Court's cases brand a denial of due process.

(3) The State Board would destroy Bratenahl by applying the *old* law of 1968, and not the *new*, viz.:

(a) The standard requiring 240 pupils in a new high school (which Bratenahl could not meet) was changed to require instead the offering of 55 units of credit (which Bratenahl could, did, and does meet).

(b) The statute which, as of July 1, 1968, required a school system to maintain twelve grades (which Bratenahl has maintained since 1971) was changed by the legislature to eliminate the critical date, July 1, 1968, on which the State Board plants its case.

The State Board's failure to deal with these critical issues is eloquent confession by it that it has no answer.

Instead of answering, the State Board urges two arguments—irrelevant to any issue now here. These two arguments do nothing to illuminate the issues.

First: The State Board disparages Bratenahl's (p. 3) "importing selected black students * * *." These students, resident and non-resident alike, are not "selected," they *elect*, voluntarily, to come. The fact is that 25% of the student body is black. Here is a case of school integration that has worked successfully for ten years. It deserves encouragement from the State Board.

Second: The State Board alleges that the Bratenahl High School (p. 3) "never met even the legal minimum standards for a high school in the State of Ohio." Even if

if this were true, it would be no defense to the State's denial of constitutional rights.

The Court of Appeals, speaking as of December 16, 1976 (A81), observed that, as of 1973, more than three years earlier, out of 272 State standards, "some deficiencies were noted" (A93), as to which the Court of Appeals found:

"The overwhelming majority of the deficiencies noted relate to facilities, rather than to the educational qualities." (A93.) [This was *before* Bratenahl in 1974 built its new high school.]

The Court of Appeals further found:

"Many of the deficiencies are quite technical in nature and easily corrected. For example, the State Board found that the band class was not scheduled for the required clock hours since the State Board considered the band class a laboratory class, rather than an academic class, the distinction being whether or not homework is required." (A93.)

The Court of Appeals gave as "another example," the State Board's finding that in 1973:

"one teacher is assigned subjects for which she does not hold a valid certificate." (A93-A94.)

Upon looking into this proof of deficiency, the Court of Appeals found:

"The evidence indicates, however, that the teacher in question holds a Ph.D. in English and teaches Journalism and Drama, as well as English. The State Board apparently will not recognize the certification to teach English to allow such teacher also to teach Journalism and Drama, although it appears that it is primarily a matter of having the teacher's certificate modified to

include those courses which obviously are closely related to English." (A94.)

The fact is, as the Court of Appeals further found:

"In many respects, Bratenahl far exceeded minimum standards." (A96.)

CONCLUSION

Only this Court can guarantee to Bratenahl the protection the Constitution gives to it.

To that end the Writ should issue.

Respectfully submitted,

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September 14, 1978

APPENDIX S (SUPPLEMENTAL)

JOURNAL ENTRY OF THE COURT OF APPEALS IN CASE NO 78 AP-414

(Entered June 29, 1978)

No. 78AP-414

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, *ex rel.*, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Relator,

v.

STATE BOARD OF EDUCATION OF OHIO,

and

DEPARTMENT OF EDUCATION OF OHIO,

and

FRANKLIN B. WALTER, Secretary, State Board of Education of Ohio,

and

SUPERINTENDENT OF PUBLIC INSTRUCTION,
Respondents.

JOURNAL ENTRY

Relator having filed a motion to expedite the hearing of this original action in prohibition and mandamus and in consideration thereof the court finds that the complaint does not state a claim upon which relief can be granted,

since the Supreme Court in *State, ex rel. Bd. of Education v. State Board of Education* (1978), 53 Ohio St. 2d 173, specifically stated that relator "was properly dissolved on July 1, 1970, by the state board" having apparently determined prior judgments of this court and the Court of Common Pleas holding to the contrary to be void and of no effect since those judgments had become final prior to the institution of the proceedings which were on appeal before the Supreme Court in that case and because a 1975 amendment to a statute can have no effect with respect to a school district which was dissolved in 1970, and accordingly the said decision of the Supreme Court is res judicata on the issues attempted to be raised herein.

Accordingly, this court hereby sua sponte dismisses this action for failure of the complaint to state a claim upon which relief can be granted.

/s/ DEAN STRAUSBAUGH
Judge

/s/ ALBA L. WHITESIDE
Judge

/s/ ARCHER E. REILLY
Judge